UNITED STATES DEPARTMENT OF AGRICULTURE
Bureau of Agricultural Economics
Washington, D. C.

# SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE of complaints filed under THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 3 - NOT TO BE PUBLISHED - July 1, 1935

## I N D E X

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(Supplementing the Alphabetical Indexes issued May 10, 1934 and October 1, 1934)

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| Shafer Inc., W.B. | Leo S. Berliner & Co. | 1462 | 923 |
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PACA SUMMARIES OF DECISIONS NOT TO BE PUBLISHED

S-628; Feb. 26, 1934, Docket 1229: (S.P.)
S-628-A, Oct. 5, 1934, Docket 1229:

SALMON LAKE SEED CO., INC., PRESQUE ISLE, MAINE vs. T. P. BLAKE & BRO., CHARLESTOWN, MASS.

Violation charged: Rejection
Principal point involved: Seller awarded damages when buyer rejected without reasonable cause; order later revoked.
Order: Reparation awarded Complainant in the sum of $56.30 with interest, and facts ordered published.

Outline of Facts

S-628, On May 20, 1931 complainant by contract in writing sold to respondent two carloads of U. S. No. 1 potatoes at $1.15 per cwt. bulk, delivered at Charlestown, Mass. By mutual agreement the contract of sale was modified by cancelling the sale of one of the two cars of potatoes. Complainant shipped to respondent the other car and the respondent rejected it. Complainant was forced to resell, which resulted in a loss to it of $56.30, being the difference between the contract price and the net resale price.

Ruling included in Decision

1. Respondent rejected the car without reasonable cause and damages should be awarded complainant in the sum of $56.30, with interest.

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S-628-A, An Order was later issued by the Secretary amending the above decision and stating that the contract of purchase and sale between the complainant and respondent was submitted as evidence in this case and was considered and relied upon by the Acting Secretary in rendering the decision but subsequent to the order evidence was submitted by the respondent that there had been material modification in the contract of sale and purchase without the consent of the respondent or the broker who negotiated the sale. The complainant was afforded ample opportunity to submit evidence in connection with the alleged material alteration of the contract and failed to submit any evidence whatsoever. Therefore it was ordered that the Acting Secretary's order dated February 26, 1934 be amended by revoking that part of the order awarding reparation to the complainant and revoking that part of the order authorizing publication of the facts and circumstances.

S-796, Sept. 14, 1934, Docket 1165: (Hearing)

MACKAY & LEHMAN, WESLACO, TEXAS, VS. H. ROTHSTEIN & SON, PHILADELPHIA, PA. AND H. ROTHSTEIN & SON VS. MACKAY & LEHMAN

Violation charged: Failure truly and correctly to account.
Principal points involved: Party claiming guaranteed advance must clearly show term was used in manner not customary in trade; commission merchant entitled to reimbursement for deficits sustained on consigned cars; counter-complaint must be filed within nine-month period.
Order: Complaints dismissed.

OUTLINE OF FACTS

Complainant alleged that it consigned to respondent one carload of U. S. No. 1 green corn at the agreed guaranteed advance of $300 f.o.b. shipping point, plus net proceeds of sale after deducting transportation and selling charges; that upon arrival of the car at destination respondent accepted the car but refused to pay the agreed guaranteed advance and that there was due and owing complainant the sum of $393.96.

Respondent Rothstein denied there was any contract whereby it agreed to a guarantee advance of $300 on the car of corn and stated that no one was authorized by him to make such guarantee. The evidence in this case clearly showed that it is not customary in the trade to guarantee a sum of money, although frequently an advance is in the nature of a loan and known as an accommodation advance. Respondent in its counter-complaint stated that the net proceeds of the sale were $93.96, which amount was not remitted because complainant was indebted to respondent for deficits incurred on seven other cars of corn. After crediting the complainant with $93.96 there remained a total deficit of $1564.70, which amount included a $15.00 deficit on two cars of onions. The record indicated that advances of $200 to $300 were made on each of the seven cars. The respondent introduced account sales showing that the deficits were incurred and the complainant failed to show in any manner that such deficits were not incurred.

Rulings included in Decision

1. It is incumbent upon a party claiming that an advance was a guarantee to show clearly and specifically that the term was used in a manner not customarily used in the trade. This the complainant wholly failed to do.

2. A commission merchant is entitled to reimbursement for deficits sustained on consigned cars where it used due care and diligence in selling same. However, no reparation could be allowed respondent because the counter-complaint was not filed within nine months from the time the cause of action accrued but the counter-complaint could be used as an answer and a defense to this action. Complainant's complaint was dismissed since the respondent showed indebtedness from the complainant in an amount greater than the sum due from the respondent to the complainant. The counter-complaint was also dismissed.

S-797, Sept. 14, 1934, Docket 1317: (S.P.)

I. SUGARMAN & SON, INC., BUFFALO, N. Y. vs PADDIN BROKERAGE CO., INC., NORFOLK, VA.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Insufficient proof of damages.
Order: Reparation awarded complainant in the sum of $1.00 nominal damages.

Outline of Facts

Complainant and respondent entered into a written contract through a broker for the sale and purchase of a mixed carload of red radishes and heavy pack spinach, both of which were to grade U. S. No. 1 and sold on a delivered basis. The car arrived in Buffalo on April 28, 1933. Complainant had the right of inspection but waived this and accepted the shipment at 5:00 A.M. on April 29; paid the draft in the sum of $304.45; unloaded a portion of the spinach and obtained a Federal inspection on the balance of the spinach remaining in the car, which inspection was made at 12:45 P.M. on April 29 and indicated that seven-eights of the remaining spinach graded U. S. No. 1 and one-eighth failed to grade U. S. No. 1. No claim was made that the radishes did not conform to the specifications of the contract and no inspection was requested on the radishes. Complainant claimed that 231 baskets of the spinach were condemned by the Board of Health of the City of Buffalo and were dumped; that U. S. No. 1 spinach at that date in Buffalo was $.65 per basket; that it sold 368 baskets of the spinach for the total sum of $97.75; that had the spinach been U. S. No. 1 complainant would have received $.65 per basket, or at least the sum of $389.35, and the complainant therefore suffered a loss of $291.60.

The certificates from the Department of Health at Buffalo showed that portions of the spinach were condemned as of May 3 to May 5, inclusive. The spinach arrived April 28 and condemnation five to seven days later did not show that the spinach was not U. S. No. 1 upon date of arrival. The condemnation included more than one-eighth of the spinach and therefore part of the spinach was condemned which at 12:45 P.M. on April 29 appeared to be U. S. No. 1 according to the Federal inspection certificate.

Ruling included in Decision

Complainant having elected to accept and unload the spinach, could only recover damages it sustained by reason that one-eighth of the spinach did not conform to the terms of the contract. The burden of proof was upon the complainant to show the proper amount of damages so sustained, which would have been the difference between the value of U. S. No. 1 spinach at Buffalo April 29, which appeared to have been 65 cents per basket, and the market value of the one-eighth part of the load shown as inferior to grade warranted. The market value of the inferior portion of the load on April 29 was not shown. Reparation was therefore awarded complainant in the sum of $1.00 nominal damages which was all that could be properly allowed.

S-798, Sept. 15, 1934, Docket 1034: (S.P.)

SOUTHERN FRUIT & VEGETABLE CORP., WINTER HAVEN, FLA., vs. ROSS A. HATCH, ALTOONA, PA.

Violation charged: Failure to account.
Principal point involved: New contract entered into.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent one carload of Wonder watermelons, 22 pound average weight, at $60 f.o.b. shipping point; that respondent accepted the shipment without complaint but thereafter declined and refused to make payment of the purchase price.

The car was in transit at time of sale and upon arrival at destination respondent inspected the melons and declined and refused to accept the shipment, claiming to the broker that an excessive number of melons showed sunburn and decay injury. Respondent advised the broker's representative, from whom the purchase had been made, concerning such defects and he thereafter communicated such information to complainant. The complainant then instructed the broker to "do the best possible with the car" and the broker's representative then told respondent that he might accept the shipment for the amount of the accumulated freight charges. Respondent paid freight charges and unloaded the melons and disposed of same.

Ruling included in Decision

Respondent accepted the shipment in accordance with the new agreement entered into with the broker and, on account thereof, the evidence failed to show a violation of the Act. The complaint was therefore dismissed.

S-803, Sept. 19, 1934, Docket 981: (Hearing)

PETER MARTORI, INC., NEW YORK, N. Y. vs. THOMAS-MORRIS PRODUCE CO., INC., SAN BENITO, TEXAS.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Nine months limitation placed on filing complaints in an f.o.b. transaction runs from the date the car is turned over to the carrier.
Order: Case dismissed.

Outline of Facts

Complainant bought from respondent two cars of tomatoes f.o.b. shipping point and they were shipped on June 11, 1932. One car arrived in Jersey City on June 16 and the other on June 17 and the complainant had inspection made on the dates they arrived. The cars were delivered at Pier 29 on June 19. Complainant accepted the cars and paid the full purchase price but filed a complaint for breach of contract, which complaint was not received by the Department of Agriculture until March 17, 1933, the complaint being dated March 16. At the hearing respondent's attorney submitted several motions among them one was that the complaint was not filed with the Secretary within the nine months provided for in the Statute.

Ruling included in the Decision

The Secretary held that since the records thoroughly disclosed that both cars of tomatoes were sold f.o.b. shipping point in Texas the cause of action was based on a breach of contract occurring not later than June 11, 1932, the date both cars were shipped. Since the complaint was not filed until March 17, 1933 more than 9 months had elapsed from the time the cause of action accrued. The Secretary's position was that the statutory limitation in the Perishable Agricultural Commodities Act relates to his jurisdiction and that this is in accordance with the decisions of the courts where similar provisions have been construed. Cases referred to in support of this construction were Louisville Cement Co. vs. Interstate Commerce Commission, 246 U.S. 638, 642 and 644 and Aachen & Munich Fire Insurance Co. vs. Morton, 156 Fed. 654.

S-804, Sept. 19, 1934, Docket 1012: (Hearing)

NASH-DECAMP COMPANY, SAN FRANCISCO, CALIF., vs. SAM FRIEDMAN & CO., MILWAUKEE, WISCONSIN.

Violation charged: Rejection.
Principal point involved: Peaches bought f.o.b. "sound on arrival", "tight pack".
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent one carload of U. S. No. 1 Pep brand Elberta peaches, at the agreed price of 40¢ per box, f.o.b. Sanger, Calif., consisting of 1211 boxes and provided that the peaches were to be "sound on arrival" at Milwaukee, Wis., and that they were to be "tight pack". Upon arrival at Milwaukee respondent refused to accept the shipment and assigned as reason for such refusal to accept that the peaches did not comply with sale specifications. Federal inspection at shipping point certified that the peache were "mostly mature hard, few mature firm" and that the pack was "mostly tight, many fairly tight". Federal inspection made upon arrival at Milwaukee showed that approximately 10% of the stock was then hard, 50% firm, 32% ripe and 8% soft, that the pact was "fairly tight to slightly slack" and that the peaches then failed to grade U. S. No. 1 on account of excess of ripe peaches and excessive percentage of soft stock. Complainant resold the car which resulted in a deficit of $486.53 and contended that respondent's rejection was without reasonable cause.

Ruling included in Decision

1. The evidence as a whole, and particularly the destination inspection certificate, was convincing that the peaches were not "sound on arrival". Moreover, both Federal inspectors indicated that the peaches were not "tight pack". Respondent refused the load immediately following inspection. It appeared, therefore, that respondent's rejection was not without reasonable cause.

S-806, Sept. 21, 1934, Dockets 1405 and 1406: (Hearing)

PEOPLES FRUIT CO., MOBILE, ALA., vs. FLIPPEN & BRO., NASHVILLE, TENN., and H. A. SPILMAN, WASHINGTON, D. C. vs. FLIPPEN & BRO.

Violation charged: Failure to account.
Principal point involved: Average sale prices insufficient to prove incorrect accounting.
Order: Both cases dismissed.

Outline of Facts

Complainant H. A. Spilman is an employee of the U. S. Department of Agriculture. During the months of April, May and June, 1933 the complainant in Docket 1405, the Peoples Fruit Co., consigned to respondent eleven carloads of vegetables which respondent disposed of for and on behalf of the said shipper. The sale of the major portion of the shipments was made by respondent in less than carload quantities from respondent's warehouse and from "stalls" in the market house located at Nashville and controlled by the City of Nashville. The less than carload lot sales made by respondent of the contents of the eleven shipments from the market house were ordinarily at a lower per unit price than sales made from respondent's warehouse. At the hearing respondent was unable to produce a book referred to as the market house record of sales and gave as the reason for its failure to produce such book that several months prior to the hearing the market house record book was lost but respondent's witnesses testified that at the time respondent rendered its account sales to the shipper respondent consulted and made up the account sales from its warehouse records and from the lost market house sales book.

Complainants alleged that the accounting rendered by respondent did not truly and correctly state the prices at which the produce was sold and that incorrect deductions were made from the reported gross receipts. At the hearing it was developed that the respondent's records were incomplete and that the individual sales were not identified and distinguished from sales from other lots; also that the investigator's figures were based on the average prices of sales shown on respondent's records during the period the respective cars were on han

Ruling included in Decision

The evidence was insufficient to definitely establish the fact that respondent's said accounts sales were incorrect. The case was therefore dismissed.

S-808, Sept. 24, 1934, Docket 159: (S.P.)

MARTIN P. BRODERICK, HAMMOND, LA., vs. H. K. AYOOB, PITTSBURGH, PA.

Violation charged: Rejection without reasonable cause.
Principal point involved: Size of cabbage.
Order: Case dismissed.

Outline of Facts

Complainant sold respondent two carload of U. S. No. 1 grade bulk cabbage to be fresh, green, round type with heads ranging in weight from 1 to 6 pounds, mostly 2 to 5 pounds each, and contended that upon arrival at Pittsburgh respondent rejected without reasonable cause and complainant was forced to resell the cabbage, being damaged in the sum of $343.90.

Federal shipping point certificates showed that the cars contained cabbage of the grade and quality specified in the contract of sale, but that the heads ranged in size from 3/4 to 5½ pounds, mostly 1 to 3½ or 4 pounds each.

Ruling included in Decision

The cabbage tendered respondent did not meet contract requirements in that the heads averaged smaller in size than in the specifications as stated in the confirmation of sale. The law is well settled that when property is delivered in pursuance of a contract of sale and the buyer finds that it is different from that which he contracted for and therefore unsuitable for his purpose or unsatisfactory to him, or that it is inferior in quality or short in quantity, he has the privilege of refusing to accept the property or of returning it to the seller and thereupon of rescinding the contract entirely. Respondent was therefore within his rights in rejecting the entire shipment of cabbage in this case and the record showed that he acted promptly in rejecting. The case was therefore dismissed.

S-811, Sept. 28, 1934, Docket 816: (Hearing)

PARENT BROS., VAN BUREN, MAINE, vs. ROBERT PELLETIER, CAMBRIDGE, MASS. AND I. D. YOUNG, CHARLESTOWN, MASS.

Violation charged: Failure to account.
Principal point involved: Buyer can not excuse its failure to pay seller because third purchaser failed to pay buyer.
Order: Reparation against Robert Pelletier awarded complainant in the sum of $5,542.79 with interest, and case against I. D. Young dismissed. Facts ordered published.

Outline of Facts

Complainant alleged that it sold to Robert Pelletier 32 carloads of potatoes at $5,542.79; that Pelletier accepted the potatoes but failed to pay for same. Pelletier admitted that he accepted the cars but contended that he sold the potatoes to I. D. Young Co. and was unable to collect from Young. The complainant amended his original complaint which was filed only against Pelletier and included Young in his complaint. At the hearing counsel for complainant admitted that there was no partnership arrangement between Young and Pelletier. The contract between Pelletier and Young and the evidence adduced at the hearing indicated that Young acted as the agent of Pelletier in the distribution of the potatoes after they were received by Pelletier. The major portion of the hearing was consumed in an effort by complainant to show that Young was guilty of fraud in his dealings with Pelletier and to support such allegations of fraud Young's records were produced and emphasis placed upon apparent erasures and corrections on such records. Respondent Young persistently and vigorously objected to the introduction of such records.

Ruling included in Decision

1. Since complainant admitted there was no partnership arrangement and since there appeared to be no contractual arrangement between respondent Young and the complainant, it was difficult to see how any irregularities in the accounting between Young and Pelletier, if any there be, could be considered as a failure by Young truly and correctly to account to complainant. It was held, therefore, that complainant failed to show any violation of the Act by respondent Young in this case.

2. Pelletier's failure to pay for the potatoes, which he admitted he received, was a violation of the Act, and reparation was awarded complainant in the sum of $5,542.79, with interest.

S-812 Oct. 5, 1934, Docket 1454: (Hearing)
S-812-A, Oct. 19, 1934, Docket 1454:

H. A. SPILLMAN, WASHINGTON, D. C., vs. CHARLES G. IBACH, MOBILE, ALA.

Violation charged: Failure truly and correctly to account.
Principal point involved: Commission merchant must account promptly to his principal.
Order: Complainant's license suspended for thirty days and facts ordered published. Enforcement of order suspended one year.

Outline of Facts

Respondent received various shipments of produce from several shippers to be sold on a consignment basis but failed to pay the net proceeds derived therefrom and persistently refused to make payment until the morning of the hearing when he tendered payment for two of the shipments.

Ruling included in Decision

Commission merchants have no right to withold and mingle the funds of their shippers with their own funds. The obligation of a commission merchant is to "account promptly" to his principal and respondent's failure to account to and pay the shippers the net proceeds due them amounted to a violation of the Act. Respondent's license was suspended for thirty days, effective October 22, 1934.

Subsequent to the above decision respondent petitioned the Secretary for a modification of the above order and upon careful review of all the facts and circumstances the Secretary ordered that no action be taken toward enforcing the original order, either by suspension of respondent's license or publication of the facts, unless within a period of one year from the effective date thereof the Secretary shall have reason to believe that respondent has violated the provisions of the Act, in which event the order shall become effective both as to suspension and publication upon a date to be specified by order of the Secretary. If during the period of one year no complaint is filed against respondent the order shall become null and void at the expiration thereof.

S-819, Oct. 5, 1934, Docket 1152: (Hearing)

CONTINENTAL PRODUCE COMPANY, BOSTON, MASS., vs. THE R. V. DUBLIN COMPANY, JACKSONVILLE, TEXAS.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Complainant must prove case.
Order: Case dismissed.

Outline of Facts

Respondent sold to complainant, five carloads of Commercial 75% U. S. No. 1 Texas onions, at 55¢ per 50 pounds, f.o.b. shipping point, which was Laredo, Texas, shipment to connect with boat leaving Galveston, Texas May 3, 1933. Complainant contended that it had no opportunity to examine the onions to determine whether they complied to contract specifications until they reached point of destination, at which time they were examined and were found to be diseased and sun-scalded, with quite a lot of splits and bad decay, whereupon demand was made by complainant for replacement, which demand was refused by respondent; that complainant was thereby damaged in the sum of $1120.50.

Respondent contended that this was an f.o.b. sale and the onions were shipped according to instructions by way of steamship; that the onions were properly loaded in first class sound condition and properly graded and that due to the crowded condition of the boat and by reason of the fact that it stopped at New York, this was not a direct shipment and the onions were damaged without fault of the respondent. The testimony in the case was in direct conflict. However, witnesses testified that it is hardly believed possible for anyone to determine whether a scald is due to the direct rays of the sun or to some other condition under which the onions were subject to heat; that there is more trouble with shipments of onions by water than by rail and that often sound onions are shipped and are received in a scalded and decayed condition due to improper ventilation in transit.

Ruling included in Decision

Complainant filed to establish by a fair preponderance of the evidence a breach of the contract and the case was therefore dismissed.

S-824, Oct. 12, 1934, Docket 1374: (S.P.)

D. B. SMITH, MERCEDES, TEXAS, vs. SAM BERGER, NEW YORK, N. Y.

Violation charged: Rejection without reasonable cause.

Principal points involved: Broker can not cancel contract without consent of both parties; a contract entered into on Sunday is not invalid if delivery made on secular day; employer responsible for error of employee.

Order: Reparation awarded complainant in the sum of $208.67, with interest.

Outline of Facts

Complainant alleged that on May 14, 1933 he sold respondent one car of root parsley containing 685 bushels at 55¢ per bushel or $376.75 plus $30 advance for initial icing making a total of $406.75 f.o.b. Mercedes, Texas; that upon arrival of the car in New York respondent rejected and complainant was forced to resell which resale netted complainant the sum of $198.08; that on account of respondent's rejection complainant suffered damages represented by the difference between the amount for which the parsley was sold to respondent and the amount realized by complainant upon resale thereof following rejection, being the sum of $208.67.

The broker's representative, Mr. Hamilton, examined the car on May 13 in Texas and wired the broker he had refused it because of the quality. However, when refusing the car he did not reveal the name of his principal. Then on May 14 the complainant wired respondent offering the car for sale and requesting an immediate reply. Respondent testified that his clerk compared the telegram with the confirmation and believing that the shipper was merely endeavoring to confirm the broker's confirmation direct with his office wired an acceptance. After discovering that Mr. Hamilton had inspected and turned down the car Mr. Berger wired the complainant that his clerk had no authority to accept the car. The respondent then had the broker write across the confirmation of sale which was dated May 13, 1933, signed by complainant and respondent through the broker, the following notation: "Cancelled by mutual agreement, Edward T. Crane, 5/15/33". Respondent also contended that the sale was invalid because entered into on Sunday, May 14th.

Rulings included in Decision

1. It is well settled that a broker who has negotiated a contract of sale between two parties can not cancel such contract unless both parties authorize him to do so.

2. The telegram dated May 14 from complainant to respondent conformed to the standard confirmation of sale dated May 13 and was answered on Sunday, May 14, by respondent through one of his employees and signed in the name of the respondent. The record clearly disclosed that the clerk was an employee of the respondent and therefore the respondent should be held responsible and not the complainant for any error that may have been made by his employee.

3. The confirmation of sale was dated May 13 and the parsley was not delivered or delivery tendered on Sunday. The law on this point in 25 Ruling Case Law 1433 states: "And where the delivery to the subject matter of or the consideration for a contract is essential to its completion, if such delivery is made on a secular day the contract will be valid although the preliminaries thereto took place on Sunday."

4. The car conformed to the specifications of the contract and respondent's rejection was without reasonable cause. Reparation was awarded complainant in the sum of $208.67, with interest.

S-825, Oct. 15, 1934, Docket 1035: (Hearing)

JIM PATTERSON, CLARKSBURG, CALIF., vs. THE HAAS BROS. CO. AND L. A. BOCKSTAHLER & CO., CLEVELAND, OHIO.

Violation charged: Failure to account.
Principal points involved: Buyer accepted goods when he unloaded and sold without making new agreement with seller as to reduction in price; acceptance by seller of payments made by buyer amounted to accord and satisfaction; in failure truly and correctly to account cause of action accrued the date payment was made.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent Haas Bros. Co., through the respondent L. A. Bockstahler & Co., three carloads of good, fancy, green Hatter brand, loose asparagus, each car containing 588 crates at $1.25 per crate f.o.b. for the contents of car PFE 70423, $1.10 per crate for car PFE 17526 and $1.00 per crate for car PFE 20106. The cars were not inspected at shipping point. The word "fancy" relates to asparagus packed in bunches and was used in this contract simply as an adjective in connection with the word "good". Neither word as applied to the quality of perishable has any very definite meaning. Apparently the minimum requirement in this case was "good, green, loose," Hatter brand asparagus. The destination Federal inspection of the asparagus in car PFE 70423 showed that the stalks were not "good green" but that the power portion was white. There was no definite showing by either party as to whether the stalks were green or not in the other two cars. Upon arrival of the cars in Cleveland respondent Haas complained to the broker about the asparagus, who wired this information to complainant requesting an allowance, or reduction in the contract price. No definite reduction was agreed upon and in the meantime Haas Bros. Co. unloaded and sold the asparagus contained in the three cars and later remitted to complainant $588 as payment for each of the three carloads. The aggregate of such payments amounted to $205.80 less than the agreed purchase and sale price. Complainant charged that Haas Bros. Co. failed truly and correctly to account.

The fourth car shipped by complainant, PFE 2642 was handled by the respondent L. A. Bockstahler & Co., as a consignment. The car arrived at Cleveland April 26. The broker turned the shipment over to Haas Bros. Co. for sale on April 27. In response to complainant's request for a report as to the handling of the fourth carload shipment, the broker on April 30 wired complainant that the asparagus had not been "all sold". Haas Bros. did not, however, start to unload the car until May 2. Complainant charged that the broker's wire of April 30 amounted to a false and misleading statement. This wire appears to have been sent through error. The broker forwarded an account of sales and made remittance for this car, which completed his duties in the matter.

Respondents contended with respect to cars PFE 70423 and PFE 17525 that complainant's right to the entering of a reparation award was barred by the nine months' Statute of Limitations.

Rulings included in Decision

1. It appeared that Haas Bros. Co. unloaded, sold and thereby accepted the shipments without making any new agreement with complainant as to a reduction price. Such exercise of control over and ownership of the stock has been construed as an acceptance thereof.

2. The acceptance by complainant of the payments made by respondent Haas Bros. Co. on cars PFE 70423, PFE 17526 and PFE 20106 amounted to an accord and satisfaction of the disputed claims of the parties.

3. Complainant failed to prove that it furnished asparagus in conformity with its warranty.

4. It appeared that Haas Bros. Co. made its payment of $588 on cars PFE 70423 and 17525, by separate checks, each dated April 27, 1932. Complainant's preliminary complaint or statement of facts made to the Bureau of Agricultural Economics was dated January 23, 1933 and was received by the Bureau a few days thereafter, which was within nine months from the date that complainant's cause of action accrued.

5. The case was dismissed.

S-826, Oct. 18, 1934, Docket 1113: (Hearing)

WILSON FLOUR & FEED COMPANY, WILSON, OKLA., vs. CICARDI BROTHERS FRUIT & PRODUCE CO., ST. LOUIS, MO.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Development of scald on Gano apples.
Order: Case dismissed.

Outline of Facts

On January 12, 1933 complainant purchased from respondent 160 barrels of apples described as Fancy U. S. No. 1 grade, Gano Apples, size 2½ inches in diameter and up, to be transported from a warehouse located at St. Louis, Mo. to Wilson, Oklahoma "by truck or rail at the option" of complainant, at $2.85 per barrel, f.o.b. St. Louis. Upon different dates in the month of January, complainant accepted three truckloads of the apples totaling 160 barrels and paid respondent the purchase price thereof, amounting to $456. Upon arrival of each of the truckloads of apples at Wilson, complainant stored them in a galvanized iron warehouse and made resale therefrom to various purchasers in complainant's trade territory.

The resales extended over a period from January 18 to February 15, 1933. A number of the purchasers complained to complainant as to the scalded and discolored condition of the apples and complainant accepted a return of some of the apples sold and made a price adjustment and settlement with certain other of the purchasers and claimed damages on account thereof in the total amount of $222.30. On January 29, 1933 complainant secured an inspection by an inspector of the State of Oklahoma who issued a certificate based upon an inspection made of a portion of the apples then located in the "Wilson Flour & Feed Company's warehouse at Wilson, Oklahoma", stating that 35% of the stock showed "more than 50% of surface covered with storage scald" and that the apples also showed "grade defects mostly worm injury insect stings and San Jose Scale" averaging 15%.

In the testimony and evidence it was brought out that complainant knew the apples in question were to be removed from cold storage; that Gano apples upon removal from cold storage and being exposed to open air and higher temperatures will ordinarily develop scald. Information to this general effect has been given to the trade and the public through distribution of a handbook dealing with fruit diseases issued by the Bureau of Plant Industry. The Gano variety of apples is among those most susceptible to scald. Scald seldom if ever becomes evident while the apples are held continuously at 32 degrees Fahrenheit but may appear within a few days following removal from cold storage. Modern cold storage methods are generally known to the trade. Complainant as a buyer of Gano apples from cold storage was chargeable with the knowledge that prompt resale and use of such apples should be made. The evidence showed that upon arrival of the apples at destination complainant inspected and found them satisfactory. They were then stored in his warehouse from where resales were made. The first complaint made by complainant was on January 27, nine days following the first resale.

Ruling included in Decision

1. The evidence failed to show that the apples did not conform to respondent's warranty thereof at the time of purchase and delivery and fails to show that the apples were then not in suitable shipping condition as cold storage stock. Under these circumstances an order was issued dismissing the complaint.

S-828, Oct. 20, 1934, Docket 758: (Hearing)

STEEL CITY FRUIT COMPANY, PITTSBURGH, PA., vs. BURKER, SIMMONS & QUINN, INC., PHILADELPHIA, PA.

Violation charged: Rejection without reasonable cause.
Principal point involved: No valid contract.
Order: Case dismissed.

Outline of Facts

Complainant entered into an oral agreement with respondent through Ross P. Sorce, broker of Pittsburgh, Pa., providing for the shipment of a car of lettuce to respondent. Inspection of the car at Pittsburgh showed the condition of the lettuce as follows: "Lettuce shows fairly good color and appearance. Stock fairly clean, crisp and well headed to 5% soft, leafy, poorly headed and outer wrappers loose leaves discolored". The Federal inspection made at Philadelphia upon arrival of the car showed the "stock fails to grade U. S. No. 1 due to defects and fairly firm in excess of tolerance." Complainant alleged that the broker inspected and accepted the car on track at Pittsburgh for the account of the respondent and complainant's representative testified that the transaction was based upon a written contract and that confirmation of same was signed by Ross Sorce, the broker, and produced a sales slip which appeared to have been signed by Ross Sorce. The Secretary of respondent company testified that he had received a number of letters from the broker during the past few years and that to the best of his knowledge and belief the signature on the sales slip alleged by complainant to be the confirmation of sale was not that of Mr. Sorce. The broker testified that the transaction was an oral one; that there was no written contract and that he did not furnish a confirmation of sale to either respondent or complainant; that the commodity which he inspected and which he purchased on behalf of respondent did not comply with the kind, quality and grade of merchandise which the complainant had agreed to sell to the respondent.

Ruling included in Decision

There was nothing in writing evidencing the contract between the complainant and respondent with regard to this car of lettuce and whatever oral arrangement there was was very indefinite and the lettuce was in bad condition at the time it arrived at Philadelphia. The somewhat loose understanding between the broker in Pittsburgh and the respondent in Philadelphia would indicate that the respondent was under no obligation to take the car in this condition. Such being the case, the complaint was dismissed.

S-832, Oct. 24, 1934, Docket 1394: (S.P.)

SHAMROCK CRANBERRY COMPANY, SHAWANO, WIS., vs. HENRY LORBER & COMPANY, INC., KANSAS CITY, MO.

Violation charged: Failure to account.
Principal point involved: Receiver acted as broker and buyer for best interest of principal, and is entitled to brokerage.
Order: Case dismissed.

Outline of Facts

Respondent wrote complainant that it was in the market for cranberries and stated in part: "On cars sold solid track, we charge the customary brokerage and on all cars unloaded and handled through our store in small lots, we charge a straight commission of 10%." After an exchange of wires and correspondence complainant shipped to respondent two cars of cranberries and upon arrival respondent wired complainant as follows: URT FIVE NAUGHT SIX THREE FIVE TRACK INSPECTION SHOWS QUALITY OK UNABLE PLACE OUT TOWN ORDER ACCOUNT FRAIL PACKAGE PRACTICALLY EVERY BOX HAVING BE REMAILED BEFORE HANDLING STOP OFFERED TRACK SALE QUARTERS TWO DOLLARS HALVES FOUR PIES DOLLAR FIFTY SHALL WE CONFIRM OR DO YOU PREFER US UNLOAD HANDLE THROUGH STORE MARKET TODAY JOBBING QUARTERS TWO QUARTER ANSWER PROMPTLY." Complainant answered: "SELL CRANBERRIES BEST POSSIBLE PRICE." Upon arrival of the cars at Kansas City the railroad agent made the following exception notes: "The following exceptions noted on unloading URT 50635, car cranberries on TT - 29 boxes 2 boxes 1/2 empty, 1 box 2/3 empty, 1 box 1/5 full, balance in bad order condition; 2 boxes empty in car."

Respondent sold the cars to the Atwell Company at the prices given in the above quoted wire but on attempting to deliver found that the purchaser was unable to pay cash on delivery, and being unable to make a resale at these prices took the car itself for sale through its own retail store at the same prices which the Atwell Company had agreed to pay and which complainant had approved. Respondent remitted to complainant the sum of $1445.70 in payment for the cranberries.

Complainant, however, contended that the half barrel boxes were to be sold at $4.50 each, the quarter barrel boxes of regular size cranberries at $2.25 each and the pie size at $1.75 per quarter barrel box. Figuring the shipment at these prices, the carload should have sold for $1852.50 instead of $1645.50 as contended by respondent. This, apparently, was the real foundation for the dispute but the Secretary held that since the record disclosed no authority for complainant's claim that the cranberries were to be sold at the higher price, but on the contrary complainant itself contended that the claim was based on the exchange of wires above mentioned, respondent's statement of prices, which, so far as the record showed, were made in good faith and based on these wires, must prevail.

While respondent acted in this transaction as both broker and purchaser, the cranberries in question here were taken by respondent as the purchaser at a resale and at the original contract price, based on cranberries in good condition, only after it was found as shown by uncontradicted testimony in the record that the Atwell Company could not pay for the cranberries; that a resale could not be made in Kansas City at the contract price and that the cranberries were not in condition to ship to any other market. In such a case, brokerage was properly deducted by respondent exactly the same as would have been done had the Atwell Company been able to pay for the cranberries. Complainant received exactly the same amount of money that it would have received had the Atwell Company been financially able to carry out its agreement to purchase the cranberries which sale was at least tacitly agreed to by respondent. Under these conditions respondent, having been placed in the position of the Atwell Company, since it paid the contract price, is entitled as such purchaser to any amount that may be recovered from the carrier for breakage or damage to the cranberries in transit. The fact that respondent acted in the dual capacity of broker and buyer can make no difference since under the peculiar situation involved in this case respondent did all that it agreed to do if the Atwell Company had been able to carry out the contract.

Ruling included in Decision

Complainant failed to sustain its contentions and respondent did not violate the Act in that it fully accounted to complainant for the cranberries in question.

S-834, Oct. 25, 1934, Docket 972: (Hearing)

SAM BUSHALA, SAN BENITO, TEXAS, vs. WINER & SAROFF COMMISSION CO., KANSAS CITY, MO.

Violation charged: Failure to account.
Principal point involved: Principal liable for acts of agent.
Order: Case dismissed.

Outline of Facts

Complainant alleged that he entered into an agreement with the respondent by long distance telephone whereby the latter was to handle several cars of corn and tomatoes on a joint account basis; that complainant shipped the corn and tomatoes to the respondent but the latter failed to remit the purchase price of the tomatoes in one car amounting to $812.50, contending that watermelons purchased by Max Karas which had resulted in a loss to respondent, were also included in the deal and that as Max Karas was complainant's agent the complainant was responsible for Max Karas share of the loss. Complainant denied that he had any connection whatsoever with the watermelon deal.

The testimony at the hearing was vague, conflicting and confusing and most of the business was transacted by telephone. However, from the record it was clear that Max Karas was employed by complainant as a foreman or manager of complainant's business at Robstown, Texas, during the time the transaction occurred; that during this time complainant was temporarily located at Jacksonville, Texas; that an agreement was entered into between complainant and respondent to handle corn and tomatoes on a joint account; that pursuant to this agreement several carload of corn and tomatoes were shipped to respondent by Max Karas, who purchased and shipped produce for complainant in every respect as though he were in charge of complainant's business in the Robstown, Texas area; that while so employed by complainant several carloads of watermelons were shipped to respondent by Max Karas and disposed of by respondent at a loss. It was quite evident that regardless of what the agreement between complainant and Max Karas may have been, the conduct of these gentlemen was such as to warrant the belief on the part of those who dealt with them that Max Karas was the agent of complainant with full authority to represent him, particularly in the Robstown, Texas area.

Rulings included in Decision

1. Applying the general principle outlined under Section 161, Chapter 6 of "Restatement of the Law of Agency" the respondent in this case was justified in considering that any agreement to deal in corn, tomatoes or watermelons entered into with Max Karas was in effect an agreement with the complainant who under such conditions must be bound thereby.

2. A countercomplaint of respondent's that the complainant was indebted to him for half the loss incurred in the watermelon deal could not be considered here as it was not filed within nine months of the time the cause of action accrued.

S-835, Oct. 25, 1934, Docket 1297: (Hearing)

SUNSHINE PACKING CORP., CLEVELAND, OHIO, vs. LEO BENJAMIN, NEW YORK, N. Y.

Violation charged: Rejection.
Principal points involved: Order subject approval of sample; rejection not within reasonable time; principal liable for acts of agent.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent one car of Cold Pack 4 x 1 MontMorency RSP Cherries, at 5¢ per pound, f.o.b. Cleveland, Ohio and that respondent rejected the car, whereupon complainant resold for a net sum of $1422.19, and suffered damages in the sum of $152.81. Respondent contended that the cherries were to be 1933 pack; that they were 1932 pack and furthermore complainant was to ship a sample barrel for respondent's approval; that respondent did not accept the sample barrel and was within its right in rejecting the car.

The respondent's principal defense was that in his negotiations with the broker he requested 1933 pack. Since the broker was acting as agent for both parties the respondent could not deny the contract as expressed in the telegrams between the brokerage company and the complainant and the memorandum of sale. The telegram from the broker to the complainant read: "Book for Leo Benjamin * * * seventy barrels thirty two pack four plus MontMorency cherries five cents f.o.b. Cleveland, subject approval sample barrel to be expressed at once." The complainant confirmed the above order exactly as it was given. However, the memorandum of sale drawn up by the brokerage company read: "70 barrels 50 gal. bbls. MontMorency/RSP Cherries © 5¢ 1 sample barrel shipped by express Aug. 10." The telegrams and the memorandum did not agree in that no mention was made in the latter regarding the pack. However, regardless of that, there was no mention in any of them of a requirement for a 1933 pack.

The sample barrel arrived and respondent after taking three of four days in his examination of this barrel rejected because the cherries were "soft like" and were 1932 cherries. Under the regulations promulgated under the Act a buyer must reject within a "reasonable time" which has been defined as not to exceed twenty-four hours. Later a Federal inspection was made which showed that the cherries conformed to the terms of the contract. The Secretary held therefore that the respondent's rejection of the sample barrel was not justified and he should be liable to complainant for whatever damages the latter suffered on account of the rejection.

Since the 69 barrels were to be shipped "subject approval sample barrel" the remaining barrels should have been of as good quality and condition as the sample. From the Federal inspection it was evident that the 69 barrel shipment was inferior to the cherries in the sample barrel, notwithstanding the sample barrel had been opened and examined approximately two weeks before the federal inspection was made and that, therefore, respondent was justified in rejecting them. Such being the case, complainant's damages should be confined to his loss on the sample barrel. Had respondent accepted the sample barrel complainant would have received $22.50 and he resold the barrel for $25.20. An express charge of $12.18 was to have been borne equally by the parties but respondent paid the total express charge. Therefore, complainant instead of suffering a loss actually made a profit by the rejection as he received more upon resale that he would have received under the original agreement.

Rulings included in Decision

1. Respondent's rejection of the sample barrel was unjustified but complainant could not be awarded damages as he suffered no loss thereby.

2. Complainant failed to comply with the agreement in that the 69 barrels were inferior in quality, color and grade to those in the sample barrel and was not entitled to any damages suffered on account of the shipment of the 69 barrels. The complaint as to the 69 barrels was dismissed.

S-837, Oct. 25, 1934, Docket 1218: (S. P.)

FELIX D'ALBORA & CO., NEW YORK, N. Y. vs. NICHOLAS PEPE, NEW YORK, N. Y.

Violation charged: Failure to account.
Principal point involved: Failure to turn over papers for claim purposes not a violation of the Act.
Order: Case dismissed.

Outline of Facts

Complainant purchased a carload of Zinfandel grapes at an auction sale conducted by the Independent Fruit Auction Company of New York, N. Y. at which sale respondent, Nicholas Pepe, acted as receiver and agent for the shipper, the San Joaquin Fruit Company of California. Complainant contended that following the auction sale, 73 boxes or lugs, were rejected and a claim filed with the railroad for the cost price of $74.83; that the railroad acknowledge the claim but could not give proper consideration to it until it was supported by an assignment of interest from respondent through a surrender of the original paid freight bill and bill of lading, both of which were in respondent's control; that because of this the railroad refused to allow payment of this claim with the exception of $15.30 which was paid as the salvage value of the 73 lugs which were rejected and refused; that complainant was damaged to the extent of $59.53 in that he bid a higher price for the grapes than he would have bid had respondent, according to the rules and practices of the auction company, announced that arrangements had previously been made for the shipper to recover from the carrier for the damage occasioned through rough handling in transit.

This controversy amounts to a suit for damages for failure on the part of respondent to turn over certain papers to complainant, or to announce before the sale was completed that this would not be done. Complainant does not charge, however, that respondent received any sum whatever from the carrier in settlement and the record indicates that he did not and does not now have in his possession any sum of money whatever which he received in connection with this transaction. Possibly a suit at law based upon the facts as set up in the complaint could be maintained against respondent, but the Perishable Agricultural Commodities Act, 1930, under which this complaint is filed, is not broad enough to support such a claim. If the shipper has received payment from the carrier for damage in transit, it might, under the circumstances set out in the complaint, be held liable under the Act, but that is impossible here because the shipper is not made a party respondent.

Ruling included in Decision

The Act is not broad enough to support a claim for damages for the failure to turn over papers or documents or the failure to announce at the proper time that such would not be done and respondent did not, therefore, violate the provision of the Act.

S-838, Oct. 25, 1934, Docket 1395: (Hearing)

H. A. SPILMAN, WASHINGTON, D. C. vs. HENRY PAPE & CO., NEW YORK, N. Y.

Violation charged: Failure to account.
Principal point involved: Conduct of respondent not sufficiently flagrant to warrant suspension or revocation of license.
Order: Case dismissed.

Outline of Facts

Complainant is an employee of the Department of Agriculture. On October 3, 1932, Little C. Hudgins, as agent for respondent, purchased from F. P. Whitehurst, Norfolk, Va. 600 bushel baskets of snap beans at the price of $1.10 per bushel, delivered to sheamship pier, Norfolk, Va. Previous to the purchase respondent had authorized Hudgins to purchase for him "a few beans" and Hudgins notified respondent that he had purchased for respondent 300 baskets of beans. 627 baskets of beans were delivered and received by respondent at New York, who until that time had no knowledge that any more than 300 baskets were to be delivered. Upon receipt of such excessive amount of beans respondent offered to take the entire lot at a reduction in price from $1.10 a basket to 90¢ a basket. The shipper refused that offer but agreed through Hudgins to accept $1.00 per basket. However, respondent sent the shipper a check for $540.90 being for 600 baskets at 90¢ per basket and no more, thereby failing truly and correctly to account in violation of the Act.

On October 7, 1932 respondent agreed through his agent, Hudgins to purchase from Whitehurst 635 bushel baskets of beans at 60¢ a basket, or a total net price of $381, delivered at the Lake Smith Station of the Norfolk Southern Railroad, Va. The beans were loaded in car BREX 76269. However, upon information furnished him by the railroad agent Hudgins informed the respondent that the beans were being delivered in car BREX 75449. Upon receipt of this erroneous information respondent notified the Pennsylvania Railroad to hold car BREX 75449 at the Jersey City Terminal for further orders. That railroad company did not withhold delivery of car BREX 76269 but delivered the car to respondent at its New York City Terminal in the early morning of October 10, 1932, and unloaded the contents thereof, and respondent was ignorant of the delivery of the car until after it had been unloaded. Upon inspection the beans were found to be in very poor condition and did not meet requirements of U. S. No. 1 grade. The respondent, on the same day of delivery to him of the beans, notified Hudgins that he was accepting the delivery for

sale upon a commission basis and thereupon sold the beans for the account of the shipper, sending to the shipper a check for $87.46 in payment thereof. The shipper, Whitehurst, refused to accept the check on such basis.

Mr. Whitehurst, in both cases above mentioned, brought an action in the Circuit Court of the City of Norfolk against Henry Pape for damages in the sum of $467.10, based upon the shipments described above, and secured judgment in that amount on August 4, 1933, which judgment was affirmed by the Supreme Court of Appeals of Virginia on January 23, 1934.

The complaint in this case under the Perishable Agricultural Commodities Act was filed for the purpose of securing disciplinary action only.

Ruling included in Decision

The facts and circumstances of this case do not disclose such unfair conduct on the part of the respondent as would warrant the suspension or revocation of his license.

S-842, Oct. 30, 1934, Docket 1006: (Hearing)

WITHERLY BROTHERS, CARIBOU, MAINE, vs. HENRY BRESKY & SONS, BRIDGEPORT, CONN.

Violation charged: Rejection.
Principal point involved: No valid and binding contract.
Order: Case dismissed.

Outline of Facts

Complainant shipped to respondent two carloads of Green Mountain potatoes, grade U. S. No. 1 and an invoice representing the claimed sale price in the total sum of $628.15 was mailed by complainant to respondent. Upon receipt of the invoice and before arrival of the two cars, respondent wired complainant that "YOUR INVOICE CAR POTATOES ARRIVED STOP NO RECORD OF ANY PURCHASE" and refused to accept the cars, assigning as a reason that the potatoes had not been purchased by him. Thereafter complainant made resale of the potatoes to other purchasers at a net return of $558.51 less than the invoice price.

The testimony of Mr. Warder, the representative of the Wm. P. Callahan Co., who was supposed to have been respondent's agent, and a representative of the Harlem River Brokerage Co. Inc. was conflicting. It appeared from the testimony that Warder and respondent discussed the matter of placing an order. Something was probably said by respondent which Warder considered he could act upon, and the expectation that by

the use of further persuasion the sale could be completed. It was clear that Warder gave the Harlem River Brokerage Co. Inc, an order for the two carloads. However, Warder was sick and confined to his home for the next few days, which probably prevented his following up the matter of completing the sale to respondent. This was indicated by the fact that respondent needed potatoes and not hearing from Warder ordered two carloads elsewhere. There was nothing in the record, however, which amounted to a written order for the two carloads in question by respondent, either in person or by agent. Therefore, against respondent there was no enforceable contract to purchase.

Ruling included in Decision

The record failed to establish an enforceable contract of sale and purchase between the parties and respondent's refusal to accept the potatoes was therefore justified.

S-845, Nov. 2, 1934, Docket 1421: (S.P.)

DEL-MAR-VA PRODUCE COMPANY, INC., MELFA, VA., vs. NATHAN M. RODMAN CO., BOSTON, MASS.

Violation charged: Rejection.
Principal point involved: Buyer delayed too long before advising seller of condition of car.
Order: Reparation awarded complainant in the sum of $187.08, with interest.

Outline of Facts

Complainant and respondent entered into a contract through a broker for the purchase and sale of one carload of U. S. No. 1 sweet potatoes which arrived in Boston, Mass. early the morning of November 23, 1933 and respondent received notification of arrival on the same date. Respondent unloaded part of the sweet potatoes and directed the carrier to sell them for whom it may concern without giving complainant any notice directly or indirectly until approximately three days after arrival of the car when the railroad notified the complainant that the sweet potatoes were "refused account condition. Ordered sold for whom may concern". Respondent had the car opened and sold by the railroad for the account of the railroad and sent the railroad a check for the entire proceeds of the sale, less expenses. The car was to contain 193 barrels according to the contract but upon arrival contained only 183 barrels which at $1.75 per barrel, after deducting freight charges of $133.17 left a net amount of $187.08.

Rulings included in Decision

1. Since this was a delivered sale the quantity received at destination should govern and if complainant had evidence that 193 barrels were shipped any action that it might have would be against the carrier and not the respondent for shortage.

2. Respondent waited an unreasonable length of time to notify the complainant as to the condition of the sweet potatoes or the attempted rejection in violation of the Act.

3. The net returns received by the carrier should be returned to the respondent since the carrier was acting for the respondent and not the complainant.

S-847, Nov. 3, 1934, Docket 1422: (S.P.)
RICHMAN & SAMUELS, INC., NEW YORK, N. Y. vs. ROY A. SARCHET, INC., DETROIT, MICH.

Violation charged: Failure to account.
Principal point involved: Complainant must prove case.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent one carload of lettuce containing 294 crates at $2.35 a crate and that respondent accounted for only 274 crates. Respondent contended that prior to the sale of the lettuce to respondent the railroad seal had been broken and apparently some crates of lettuce had been removed from the car and submitted a sworn statement that the number of crates of lettuce were carefully checked and counted and that there were only 274 crates in the car when purchased by respondent. Complainant denied that 20 crates were removed from the car and submitted an affidavit to the effect that only four crates of lettuce were removed from the car and that these were returned before the sale was made to respondent. Respondent offered to submit to complainant a list of sales showing delivery of only 274 crates together with an affidavit but the latter rejected the offer.

Ruling included in Decision

This was a delivered sale to respondent at Detroit and while the evidence was conflicting the complainant failed to establish by a fair preponderance of the evidence that the car contained more than 274 crates of lettuce at the time it was purchased by respondent.

S-855, Nov. 12, 1934, Docket 1375: (S.P.)

LEON BROTHERS, INC., BUFFALO, N.Y. vs. UNITED CELERY AND PRODUCE CO., DETROIT, MICH.

Violation charged: Failure to account.
Principal point involved: Complainant failed to carry out instructions of respondent in selling the latter's produce.
Order: Case dismissed.

Outline of Facts

Complainant alleged that respondent consigned to it to be sold for respondent's account one carload of onions; that upon arrival of the onions complainant sold same for the account of respondent at the highest price which it was able to secure, resulting in a deficit of $113.82; that complainant forwarded to respondent a correct account of sales showing in detail the sales and the deficit but the latter refused to reimburse complainant for the deficit incurred.

Respondent contended that its instructions to complainant were specific that the car was to be sold "solid" and not to be handled from their warehouse and if the onions were not sold solid as soon as possible the respondent was willing to divert the onions to another point. Respondent also submitted a letter written to complainant directing that the car was to be "sold solid" and further stating "if you are not in a position to obtain the price mentioned in our previous letter, please do not break the car". The sales tickets showed the onions were sold at various times and that complainant did not comply with the instructions of the respondent.

Ruling included in Decision

Because of failure of complainant to comply with the instructions of the respondent as to the manner of selling the onions the complaint should be dismissed.

S-856, Nov. 13, 1934, Dockets 1334 and 1334-A

TRACY WALDRON FRUIT CO., SALINAS, CALIF., vs. CONNECTICUT FRUIT & PRODUCE CO., NEW HAVEN, CONN., and COUNTERCOMPLAINT.

Violation charged: Rejection
Principal point involved: Rejection 48 hours after arrival not within reasonable period.
Order: Reparation awarded complainant in the sum of $204.75, with interest.

Outline of Facts

Complainant sold to respondent on Nov. 1, 1933, one carload of Muscat grapes at 92½¢ per lug delivered at New Haven, Conn. The grapes arrived at New Haven on November 6, at 4:00 A.M. and delivery was promptly tendered to respondent. The grapes were accepted by one Mr. Cutler at approximately 5:00 P.M. the same day in conversation with a representative of the broker. However, at 1:30 P.M. November 8 Mr. Rosenfield, an authorized agent of respondent, by oral notice to the broker rejected the grapes. The memorandum of sale contained a clause that rejection must be made within 24 hours. On November 10 the grapes were delivered to respondent upon agreement to pay 75¢ per lug delivered New Haven with the further agreement that it submit to the Department of Agriculture for disposition the matter of liability for the loss sustained by the complainant in the sum of $204.75, being the difference between the original invoice price and the resale price. Respondent relied upon a Federal inspection made on November 8 at 10:30 A.M., at which time a portion of the load was inspected and found not to grade U.S. No. 1 juice grapes on account of raisining and raisined berries in excess of the tolerance in many boxes. Whether the grapes were U.S. No. 1 at the time of delivery was not disclosed.

Ruling included in Decision

Respondent did not reject the grapes until more than 48 hours after delivery was tendered, which was an unreasonable length of time, and therefore the rejection was without reasonable cause.

S-859, Nov. 13, 1934, Docket 1420: (S.P.)

JAC BOKENFOHR, THIBODAUX, LA., vs. BROADWAY FRUIT MARKET, CAPE GIRARDEAU, MO.

Violation charged: Rejection
Principal point involved: F.o.b. shipment not in suitable shipping condition.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract through a broker for the sale and purchase of one carload of Triumph potatoes which were to grade 75% U.S. No. 1 at $1.50 per cwt. f.o.b. Braggs, Okla. or $375. Upon arrival of the potatoes respondent after inspection rejected the car, stating that at least 50% did not grade U.S. No. 1; that not less than 10% were rotted, spoiled and not fit for consumption and that the sacks were wet, potatoes dirty and scabby. The potatoes were diverted to complainant at Paducah, Ky. where complainant's agent inspected them and found them in too bad condition to sell, whereupon they were abandoned to the carrier.

Ruling included in Decision

The potatoes were to be 75% U.S. No. 1, f.o.b. shipping point and upon arrival at destination were in such bad condition as to show they were not in suitable shipping condition at the time shipped and therefore respondent's rejection was not without reasonable cause.

S-861, Nov. 13, 1934, Docket 1233: (Hearing)

CHRISTIAN & NEAL, McINTISH, FLA., vs. SANTO PANTANO, BOSTON, MASS.

Violation charged: Rejection
Principal point involved: "Suitable shipping condition" in f.o.b. sale.
Order: Case dismissed.

Outline of Facts

Complainant sold respondent one carload of 26 lb. average Watson watermelons at $300 f.o.b. Metcalf, Ga. Upon arrival respondent rejected the car and complainant resold for a net sum of $87.38 and claimed reparation in the sum of $212.62.

Respondent contended that the melons were rotten and Federal inspection at destination showed that they failed to Grade U.S. No. 1 only on account of decay, the melons showing an average of 10% decay and also many melons showed no evidence of stem treatment; that there was a delay in shipment, the car arriving too late for the holiday trade, but his main reason for rejecting the car was on account of the decay. The man to whom the melons were resold testified that he only bought broken stuff and that the melons were spotted and decayed; that they were not fit for retail trade when he bought them; that he was not associated in business in any way with respondent and that he sold the melons to peddlers.

The contract of sale in this case was entered into while the car was rolling. The requirement in an f.o.b. sale is that the commodity at time of sale shall be in such condition that when handled under normal transportation service and conditions it will assure delivery without abnormal deterioration. Respondent failed to show by sufficient evidence that transportation service and conditions were abnormal. Assuming that there was no abnormal transportation service the melons if in suitable shipping condition should have arrived at destination "without abnormal deterioration". The Government inspection at destination showed a 10% decay. This is abnormal in watermelons. Moreover, the certificate showed the decay to have been stem end rot. It is known to the trade that this is a fungus disease caused by the spores or germs finding lodgment in the vegetable wound, such as the cut stem end necessary, of course, to detach the watermelons from its vine. In order to prevent this rot railroads generally require a stem end treatment. However, the certificate stated that "many melons show no evidence of stem end treatment" from which it would appear that proper precautions were not taken in shipping the watermelons.

Ruling included in Decision

The melons were not in suitable shipping condition when shipped and therefore respondent's rejection was not without reasonable cause.

S-863, Nov. 13, 1934, Docket 497: (Hearing)

BURKLEY PRODUCE COMPANY, PITTSBURGH, PA. vs. RICHMAN & SAMUELS, INC., NEW YORK, N.Y.

Violation charged: Failure to deliver
Principal point involved: No contract
Order: Case dismissed.

Outline of Facts

The complaint alleged that respondent by contract in writing sold to complainant a car of Chilean onions containing 600 crates at $2.75 f.o.b. New York, per crate, the total price being $1,650; that respondent failed to ship the car and complainant suffered damage in the sum of $690.

The evidence showed that the parties entered into an agreement for the shipment and delivery by respondent to complainant of one car of Chilean onions in accordance with the following telegram: "REFERENCE CHILEAN ONIONS SOLD BURKLEY PRODUCE CAR $2.75 FOB CARS YOU TO EXPRESS CRATE EACH SIZE THREE, FOUR, FIVE INCH ARRIVAL STEAMER FOR THEIR APPROVAL OF TYPE AND GRADING BILLING THEM FOR SAMPLES". The respondent did not ship the samples.

Ruling included in Decision

There was merely an offer to sell at a specified price a car of onions of a size or sizes to be selected by the buyer from samples of three different sizes to be furnished by the seller for the buyer's approval of type and grade. The buyer could not be compelled to accept the offer if the samples did not suit him and consequently had no contract for a car of onions and no cause of action for the seller's failure to deliver a car of onions.

S-866, Dec. 4, 1934, Docket 1313: (S.P.)

VERIL BALDWIN, McGUFFEY, OHIO, vs. LOSMAN PRODUCE CO., PITTSBURGH, PA.

Violation charged: Failure to account
Principal point involved: Deduction for loss on onions which did not meet specifications justified.
Order: Reparation awarded complainant in the sum of $252.23.

Outline of Facts

Complainant sold to respondent one carload of U.S. No. 1 onions, 60% over 2", at 80¢ per 50# bag delivered, or $400. Upon arrival of the onions respondent sold 150 bags and the following day had a Federal inspection which showed that the onions did not then grade U.S. No. 1 on account of sprouts. Respondent sold the onions suffering a loss of $81.55. Later the complainant wrote the broker that he would allow respondent $62.50 and respondent mailed complainant a check for $252.25, which was the purchase price of the onions after making the following deductions: freight, $81.25, allowance, $62.50, inspection cost, $4. Complainant returned the check.

Ruling included in Decision

The onions did not conform to the specifications of the contract and respondent was justified in deducting $62.52 as well as freight charges and inspection costs. Reparation should be awarded complainant in the sum of $252.23 without interest in view of the fact that respondent tendered to the complainant the sum of $252.25 and at the time of the decision was still holding a check for this amount awaiting acceptance by complainant.

S-867, Dec. 4, 1934, Docket 1377: (S.P.)

E.D. MARTIN & CO., CHARLESTON, W.VA. vs. GEO. W. HAXTON & SON, INC., OAKFIELD, N.Y.

Violation charged: Failure to deliver.
Principal point involved: Complainant must prove violation and damages.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract by telegraph for the sale and purchase of a carload of bulk Danish cabbage, from 2 to 5 pounds, at $21 per ton, f.o.b. Lawrenceville, Pa. Complainant contended that the cabbage upon arrival was not in conformity with the contract terms and that the actual loss incurred was $10 per ton. Respondent contended that the cabbage was in suitable shipping condition and met the contract terms. The evidence was conflicting.

Ruling included in Decision

The evidence in the case is so conflicting on the question of whether the cabbage conformed to the specifications of the contract of sale that the complaint might be dismissed on the ground that the complainant failed to establish by a fair preponderance of the evidence that the cabbage did not conform to the contract of sale. However, the evidence clearly disclosed that the complainant, although afforded ample opportunity to do so, failed to establish that he sustained any definite amount of damage by reason of the alleged breach of the contract and for this reason the complaint was dismissed.

S-869, Dec. 5, 1934, Docket 1489: (Hearing)

H. L. LYONS, POMPANO, FLA., vs. L.H. KRALLMAN, ST. LOUIS, MO.

Violation charged: Failure to account.
Principal points involved: Buyer must pay in full for produce bought or give proof in counter-complaint of breach of warranty and damages incurred thereby; voluntary allowance by seller.
Order: Reparation awarded complainant in the sum of $899.10, with interest.

Outline of Facts

On April 20, 1934, respondent purchased from complainant one carload of California Wonder Peppers consisting of 318 crates of Fancy peppers and 129 crates of Choice peppers, and failed to pay the purchase price thereof. The broker's confirmation of sale advised respondent that the car was rolling at the time of purchase, and the purchase was made on an f.o.b. basis. The shipping point Federal inspection certificate indicated that at the time of loading the stock conformed as to quality and condition to complainant's warranty thereof. Respondent made inspection at destination and unloaded and sold from the car approximately 175 crates. He then secured destination inspection and the inspector found that samples examined in the remaining portion of the load showed decay of from 6 to 15%. The respondent completed the unloading of the peppers and sold same but kept no account of the aggregate of sales and at the hearing was unable to testify as to such sale prices or the aggregate thereof. Complainant made a voluntary allowance to respondent of $44.70.

Rulings included in Decision

1. While it is true that the decay shown by the destination inspection was greater than would be expected in a shipment of green peppers that were in fact in suitable shipping condition at time of loading, respondent having accepted the shipment his remedy would be to "set up against seller a breach of warranty by way of recoupment in diminution or extinction" of the purchase price or file a counter-claim for damages based upon breach of warranty. Respondent took neither of these courses and moreover his proof of damages was insufficient as a basis for an award in any definite amount.

2. Respondent's failure to truly and correctly account for the peppers was a violation of the Act and reparation was awarded complainant in the sum of $899.10, with interest, which was the difference between the original purchase price of $943.80 and the $44.70 voluntary allowance granted by complainant.

S-870, Dec. 6, 1934, Docket 1365: (S.P.)

MORRIS APRIL & BROS., BRIDGETON, N.J. vs. GLAS, BLOOM & CO., CINCINNATI, OHIO.

Violation charged: Failure to account.
Principal point involved: Respondent not liable for full purchase price when goods inferior to contract specifications.
Order: Complaint dismissed provided respondent remits the sum of $70.66.

Outline of Facts

Complainant and respondent entered into a contract for the sale and purchase of a carload of fancy green string beans at $1.75 per bushel hamper, f.o.b. Bridgeton, N.J. Inspection showed part of the beans were fancy and for these the respondent paid complainant the contract price of $1.75 per hamper; part of them were of a much lower grade and quality, and the respondent sold these beans for the account of complainant, in which act it was justified. Respondent remitted to complainant the full purchase price for all the beans that conformed to the contract and the net proceeds of $70.66 for the beans which did not conform to the contract, which latter amount was returned by complainant. Complainant claimed damages in the sum of $414.75, the full purchase price at $1.75 per hamper for the 237 hampers which the respondent sold for complainant's account at lower prices because of the condition of the beans.

Ruling included in Decision

Respondent's accounting to complainant was not in full violation of the Act. The complaint was dismissed provided respondent remit to complainant the sum of $70.66.

S-874, December 8, 1934, Docket 1294: (Hearing)

TEXAS FRUIT AND VEGETABLE COMPANY, TYLER, TEXAS, vs. J. BERT MORITZ CO., INC., NEW YORK, N.Y.

Violation charged: Failure to account.
Principal points involved: The principal is responsible for the acts of his agent but only within scope of his authority, actual or implied; meaning of "guaranteed advance" and "accommodation or regular advance".
Order: Reparation awarded complainant in the sum of $174.61.

Outline of Facts

Complainant alleged that it sold to respondent, through the latter's agent, by consignment on a guaranteed advance, four carloads of tomatoes at the agreed total price of $2,025, f.o.b. Texas shipping point; that respondent accepted them and sold them for the account of complainant but refused to pay complainant the net proceeds of the guaranteed advance on the first two cars and that complainant owed respondent the sum of $1,050.

The transaction covering the four cars was well summarized in a telegram dated July 11, 1933 from complainant to the agent, Chas. Vogt, as follows: "ALL FOUR CARS CONSIGNED MORITZ THROUGH YOU WERE ON GUARANTEED ADVANCES YOU SIGNED INVOICE AND DRAFT ON FIRST CAR WITH GUARANTEED ADVANCE WRITTEN IN INVOICE OTHER THREE CARS GUARANTEED ADVANCE WRITTEN IN DRAFTS WHEN YOU SIGNED THEM THERE IS NO REASON FOR MISUNDERSTANDING ON THESE CARS YOU HAVE DRAFTS PAID ON PACIFIC FIVE NAUGHT NINE SIX TWO FOR SIX HUNDRED FIFTY DOLLARS AND PACIFIC SIXTEEN NAUGHT NINE SEVEN FOR FOUR HUNDRED DOLLARS WHICH WERE GUARANTEED ADVANCES AS STATED IN YOUR WIRE TODAY * * * * *". Vogt replied on the next day as follows: "ONLY CARS UPON WHICH GUARANTEE ADVANCE ALLOWED WERE FIFTY NINE SIX TWO STOP FOUR HUNDRED DOLLARS ON PFE SIXTEEN NAUGHT NINETY SEVEN STOP ALL OTHERS WERE ACCOMMODATION ADVANCE ONLY * * * *". Telegrams were introduced to show that respondent instructed Charles Vogt not to make guaranteed advances and respondent denied all knowledge of the advances made by Vogt, and contended that the advances made on the cars above mentioned were regular or accommodation advances.

It was brought out at the hearing that sales on guaranteed advances are unusual rather than the usual practice of the trade and that this placed a duty on complainant to get a confirmation from respondent before relying on any agreement with the agent regarding guaranteed advances and certainly before shipment of the tomatoes.

The accounting rendered by respondent in the transaction involved herein shows the respondent is indebted to complainant in the sum of $174.61. A check for this sum was sent by respondent to complainant who refused to accept it and returned it to respondent.

Rulings included in Decision

The law is well settled that a principal is responsible for the acts of his agent but only within the scope of his authority, actual or implied. Respondent contended that while he agreed to an advance, he never authorized his agent to contract for a guaranteed advance and in fact instructed him not to make any guaranteed advances. Despite this apparent very clear understanding between respondent and his agent, it was clear that the agent did contract with complainant for shipment of at least a part of the tomatoes to respondent on what at least complainant believed was a guaranteed advance. The Secretary stated that this called for an interpretation of what the fruit and vegetable trade understands by the term guaranteed advance and how contracts for shipment under a guaranteed advance are consummated in that trade.

Although testimony given in this and other cases disclosed that the terms "advance" and "guaranteed advance" are sometimes rather carelessly used it seems to be fairly well understood by those engaged in the fruit and vegetable trade that the term "guaranteed advance" as used in connection with an advance payment on consigned produce means that the party making the advance payment guarantees that the net proceeds to the consignor shall at least equal the amount advanced and in any case where a guaranteed advance is made the consignor can not be held liable for any deficit resulting from the sale of the produce. Unless otherwise provided by agreement, the transaction is considered as a consignment or joint account and not a purchase and sale. Anyone making a guaranteed advance, therefore, must render a complete accounting as in any other case where a consignment is involved and of course must also remit the net proceeds over and above the cost of handling including the agreed commission or brokerage. By the term "regular advance" or "accommodation advance" is meant that the shipper has received a sum of money to enable him to make shipment and if the produce does not sell for enough to cover the cost of transportation and handling, including the customary brokerage, the shipper must return to the one making the advance a sum equal to the loss involved. In other respects, the transaction is handled the same as any other sale or shipment on a consignment basis as the case may be.

In Vol. 27 of Ruling Case Law, page 187, Sec. 29, it is laid down as a well known principle of law that "If a known usage or custom of trade or business exists persons carrying on that trade or business are held to have contracted in reference thereto, unless the contrary appears, and such custom or usage forms a part of the contract. There is no such thing as discretion in usage or custom of trade. They are absolute, imperative and universal in favor of, and against all the parties, when no special agreement to the contrary is made. Also under Section 21, pages 173 and 174, of the same authority, it is said that: "In determining the extent of the power of an agent, or his rights or liabilities under the contract of agency, it is well settled that the usages and customs of the particular trade or business in question must be taken into account. If an agent is commissioned to do any act, nothing being said as to the mode of performance, he has implied power to perform his duties in accordance with any recognized usage or mode of dealing. Moreover, an agent should execute his authority in the usual manner and has no authority to depart from the custom as to manner of accomplishing what he is employed to effect."

Complainant failed to establish by a fair preponderance of the evidence the existence of a contract with respondent to ship on a guaranteed advance and for that reason there could be no breach of such contract and settlement must be made on the basis of the accounting rendered by respondent which shows $174.61 due and owing from respondent to complainant. Reparation was therefore issued in that amount.

S-876, Dec. 13, 1934, Docket 1382: (Hearing)

PETLET & CATHER, INC., WINCHESTER, VA., vs. E. WATERMAN & CO., NEW YORK, N.Y.

Violation charged: Rejection
Principal point involved: Rigid requirements for apples sold for export to Argentina must be strictly observed.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent a carload of U.S. No. 1 apples approximately half Delicious and half Ganos, at a price of $766.50 f.o.b. Stuarts Draft, Va., for shipment to Argentina. The apples were inspected at shipping point by Federal inspector and certified as suitable for shipment to Argentina. Upon arrival of the car at the port of embarkation, the car failed to pass Quarantine inspection for shipment to Argentina and respondent rejected. Complainant contended that it sold the apples to respondent subject only to passing Argentine sanitary certificate requirements at shipping point in Virginia and requested damages incurred by respondent's rejection.

The statement made to respondent by the senior inspector in charge of plant quarantine at New York City said in part: "* * * Out of this carload, four barrels were opened and 50 per cent of the contents of each barrel was examined. As a result, one apple was found infected with bitter rot and one with apple cedar rust. Since the Argentine form of certificate requires absolute freedom from bitter rot, no certificate was issued."

Article 2 of Argentine Decree No. 17614 of February 24, 1933 which was in effect at the time the transaction in controversy here was entered into, was as follows: "Barreled apples which it is desired to introduce into Argentina must be accompanied by an inspection certificate issued by competent authority of the respective state, and by a second certificate issued by experts of the United States Department of Agriculture. These certificates must be presented to the Argentine Consul nearest to the point of embarkation for authentication of the signature."

Rulings included in Decision

The Secretary said: "Since complainant and respondent entered into the contract here involved with a distinct understanding that the sale was subject to Argentine sanitary requirements, they must be presumed * * * to have been aware of the fact that the apples must pass an inspection at shipping point and another at the port of embarkation and to have entered into the contract of purchase and sale with these conditions in mind. Unquestionably, the apples in controversy here were sold under a warranty of fitness for shipment to Argentina which is more than a warranty of fitness for a general purpose or even for export. In Dunbar Bros. Co. vs. Consolidated Iron-Steel Mfg. Co., 23 Fed (2d) 416, 419, the court said: 'A warrant of merchantability is a warranty that the goods are reasonably fit for the general purpose for which they were sold, while a warranty of fitness is a warranty that the goods are suitable for the special purpose of the buyer, which will not be satisfied by mere fitness for general purposes.' In Davenport Lumber Co. v. Edward Hines Lumber Company, 43 Fed (2d) 63, 67 the court said: 'The raising of an implied warranty of fitness depends upon whether the buyer informed the seller of the circumstances and conditions which necessitated his purchase of a certain character of article or material and left it to the seller to select the particular kind and quality of article suitable for the buyer's use. This is the rule regardless of whether the case is governed by the common law or the Uniform Sales Act.'

"In the matter in controversy in the instant cause, complainant admits knowledge of the purpose for which the apples were purchased and of the extremely strict requirements laid down by the government of Argentina. While under ordinary conditions the finding of but one apple affected with bitter rot in an entire carload would most likely be disregarded and considered a substantial compliance on the part of complainant, yet under the peculiar circumstances involved herein it was within the domain of the Federal quarantine authorities at New York to say whether or not the apples met requirements for export to Argentina, the sole and only purpose for which the apples were purchased by respondent. A refusal of the Federal quarantine authorities to issue a certificate of inspection at New York was in this case equivalent to a reversal of the shipping point inspection upon which complainant's case rests and the complaint must, therefore, be dismissed."

S-877, Dec. 13, 1934, Docket 1040-A: (Hearing)

LEON BROS., INC., BUFFALO, N.Y. vs. EGYPTIAN FRUIT CO., ANNA, ILL.

Violation charged: Failure to deliver in accordance with contract terms.
Principal point involved: Size of apples.
Order: Reparation awarded complainant in the sum of $109.65, with interest.

Outline of Facts

Complainant purchased from respondent one carload of Transparent apples warranted as grade U.S. No. 1, minimum two inches in diameter, at $1.10 per bushel basket f.o.b. Anna, Ill. or a total price of $530.80 which complainant paid to respondent. Upon arrival of the car complainant secured a Federal inspection who issued a certificate wherein he certified the size of the apples, based upon samples selected from 198 baskets then remaining of the total load which originally consisted of 528 bushel baskets, as follows: "SIZE: Apples under two inches in diameter are found in all sample baskets ranging from 10% to 36%, averaging 23%. Apples by weight are under two inches in diameter;" the shipment therefore failed to conform to respondent's warranty as to minimum size. Complainant sold the apples to various purchasers for prices ranging from 35¢ to $1.50 per bushel basket, for a total gross amount of $471.15, suffering a total loss of $109.65.

Ruling included in Decision

Respondent's failure to furnish apples in accordance with its warranty was without reasonable cause and in violation of the Act. Reparation was awarded complainant in the sum of $109.65, with interest.

S-878, Dec. 13, 1934, Docket 1450: (S.P.)

MOORE GROCERY CO., SAN MARCOS, TEXAS. vs. SHIELDS FRUIT CO., FREEWATER, OREGON.

Violation charged: Failure to deliver
Principal point involved: Complainant must prove damages in claim for reparation.
Order: Case dismissed.

Outline of Facts

Complainant entered into negotiations with respondent through two brokers for the purchase and sale of a carload of apples. Respondent received orders from each of the agents for a carload of apples identical in size, quality and variety. Respondent could not furnish the exact sizes ordered and received a wire from one of the agents stating that complainant thought he could buy the exact sizes elsewhere, whereupon respondent assumed that the order was cancelled. It appeared that complainant had employed one broker to carry on the negotiations and not receiving word from that agent that the order had been confirmed he advised that broker that he did not wish to proceed further with the order and employed a second broker without informing him of having had negotiations with the first broker. Respondent did not ship the car and complainant requested damages in the sum of $114.50 "which amount represents the difference between the profit on the apples which were bought on the open market in order to cover sales heretofore made and the profit complainant would have made on the same quantity of apples had they been shipped by respondent."

Ruling included in Decision

The evidence in the case disclosed that both complainant and respondent were each dealing with two brokers in connection with the apples in question and due to this fact and the misunderstanding between the parties arising in connection therewith it was difficult to determine whether any valid contract was entered into between the parties. However, complainant failed to establish a definite amount of damages, although given ample opportunity to do so, and for this reason the case was dismissed.

S-879, Dec. 13, 1934, Docket 1319: (S.P.)

THOMAS J. MURPHY, FORT MYERS, FLA. vs. A. ZIMMERMAN & CO., PHILADELPHIA, PA., and/or NATIONAL FRUIT DISTRIBUTORS, INC., HAINES CITY, FLA.

Violation charged: Failure to account.
Principal point involved: Consignor must pay for deficit incurred in sale of his produce.
Order: Reparation awarded complainant in the sum of $143.60, with interest, against A. Zimmerman & Co. and complaint against National Fruit Distributors, Inc. dismissed.

## Outline of Facts

Complainant contracted with A. Zimmerman & Co. to handle for the latter's account four cars of grapefruit packed and shipped by the National Fruit Distributors, Inc. The complainant handled the grapefruit upon a consignment basis for Zimmerman, which resulted in a deficit of $143.60 on three of the cars, the fourth car not being in dispute since all selling charges were paid on it. Zimmerman contended that complainant was really handling the fruit for the National Fruit Distributors, Inc. and that Zimmerman was merely acting as the latter's agent; that the National Fruit Distributors, Inc. required certain financial advances to cover packing charges in order to be able to pack and ship the grapefruit; that Murphy could not make the advances whereupon Zimmerman and Murphy agreed that the National Fruit Distributors, Inc. would ship the grapefruit to Murphy to be handled by him for its account on a brokerage basis and that A. Zimmerman & Co. would invoice the fruit to him on sale and accounting would be rendered to A. Zimmerman & Co. in order that they could deduct any advances they had made.

However, the weight of the evidence in the case showed that the complainant handled the grapefruit for A. Zimmerman & Co. to whom he rendered account sales, and that the low prices received for the grapefruit were due to its quality and condition and that respondent Zimmerman admitted that it had "had too much gas or had been grown with too much synthetic fertilizer." After the account sales had been rendered by the complainant to Zimmerman a check was drawn by the latter for $143.60 in full payment of the deficit but Zimmerman later stopped payment on the check. At the time this check was drawn Zimmerman was in possession of all the material facts and apparently the only reason payment was stopped was because he was advised by the National Fruit Distributors, Inc. to stop payment on the check as they had already lost packing charges and were not in position to pay the deficit. The National Fruit Distributors, Inc. was also named as respondent in the complaint filed, but the evidence disclosed that they were improperly named as a respondent.

## Rulings included in Decision

A. Zimmerman & Co. failed truly and correctly to account to complainant in the sum of $143.60 and reparation was awarded complainant against Zimmerman in that amount.

The complaint against the National Fruit Distributors, Inc. was improperly made and was therefore dismissed.

S-880, Dec. 14, 1934, Docket 1175: (Hearing)

CUMMINGS BROKERAGE CO., BELLE GLADE, FLA., vs. A. M. TOURTELLOT, PROVIDENCE, R.I. and/or F.J. ROGERS COMPANY, PROVIDENCE, R.I.

Violation charged: Rejection.
Principal point involved: Complainant must prove case.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent Tourtellot one carload of U.S. No. 1 green beans at $1.75 per hamper delivered at Providence; that the sale was made through F.J. Rogers Co., brokers; that respondent rejected the car without reasonable cause and complainant was damaged in the sum of $279.79. Respondent Tourtellot contended that he purchased a car of "Fancy Bountiful Beans" as evidenced by the Standard Memorandum of Sale; that a Federal inspection made at destination showed that the car failed to grade U.S. Fancy and that his rejection was not without reasonable cause. It appeared from the evidence that complainant wired the F.J. Rogers Co. as follows: "WESTERN 60815 RICHMOND DIVERSION FANCY BOUNTIFUL BEANS EIGHTY CENTS"; that Mr. Martin, an employee of the broker showed the telegram to respondent Tourtellot who offered to purchase the carload of beans provided they were clean and well packed hampers; that several wires were then exchanged between Mr. Martin and complainant but Mr. Martin through mistake substituted U.S. No. 1 for U.S. Fancy; that the brokerage company without noticing the statement of U.S. No. 1 in the telegrams drew up a standard memorandum of sale specifying "One car of Florida Hamper Fancy Bountiful Beans sold at $1.75, delivered Providence"; that the standard memorandum of sale called for an immediate objection if the interested party found the terms specified on the memorandum of sale contrary to authority given the broker, otherwise acceptance of the terms would be presumed; that a copy was mailed to complainant who ignored this statement in the memorandum of sale but contended that the rejection was due to market conditions; that the beans were never inspected for U.S. No. 1 and there was therefore no evidence to show that a carload of U.S. No. 1 beans were delivered to respondent Tourtellot; that all Government evidence showed the contents of the car were questionable and when resold at Boston the beans did not sell at the top of the market; that the Federal inspection report showed some coarse stock and scars with a few advanced Anthracnose spots and also showed that the car contained two brands of beans, although most covers were unmarked making it necessary to open each basket in order to ascertain the kind of beans contained in the car.

Ruling included in Decision

Complainant failed to introduce any evidence whatsoever showing that U.S. No. 1 beans were actually delivered at Providence and there was therefore nothing in the record to show that respondent's rejection was without reasonable cause and for that reason the case was dismissed.

S-[illegible], Dec. 14, 1934, Docket 1491: (S.P.)

SHAFTUCK IRRIGATION CO., IDAHO FALLS, IDAHO, vs. ROBERT P HARDEGEN, PHILADELPHIA, PA.

Violation charged: Failure truly and correctly to account.
Principal point involved: Consignee must pay in full.
Order: Reparation awarded complainant in the sum of $202.40, with interest.

Outline of Facts

Complainant consigned to respondent to be sold for its account one carload of No. 1 potatoes shipped from St. Leon, Idaho, to respondent at Philadelphia, Pa., in car PFE 25511. Upon arrival of the potatoes at Philadelphia respondent accepted and sold the same for the account of complainant and mailed check for $299.90 which check was protested for insufficient funds. Complainant claimed $302.40, including protest fee, as damages. It later developed that respondent had paid $100 on account leaving a balance due of $202.40.

Ruling included in Decision

Failure to pay is a violation of the act.

S-[illegible], Dec. 14, 1934, Docket No. 1490: (S.P.)

SHAFTUCK IRRIGATION COMPANY, IDAHO FALLS, IDAHO vs. ROBERT P. HARDEGEN, PHILADELPHIA, Pa.

Violation charged: Failure truly and correctly to account
Principal point involved: Consignee must pay in full.
Order: Reparation awarded complainant in the sum of $202.90, with interest.

Outline of Facts

Complainant consigned to respondent one carload of potatoes at the agreed price of $2.10 per hundred and the agreement was modified on March 12, 1934, by the parties, authorizing respondent to sell the potatoes for the best price obtainable. Complainant shipped the car of potatoes called for in the agreement and in the manner agreed upon in car PFE 30919 and upon arrival of the shipment it was accepted and sold for complainant's account by respondent, who remitted $227.45 by check which was protested because of insufficient funds. Complainant claimed damages in amount $229.90, including protest fee of $2.45; but it later developed that respondent had paid $27 on account, leaving a balance of $202.90.

Ruling included in Decision

Failure to pay is a violation of the Act.

S-887, Dec. 19, 1934, Docket No. 1329: (S.P.)

GROVIER-STARR PRODUCE CO., HUTCHINSON, KANSAS vs. J.H. GILINSKY, CALDWELL IDAHO.

Violation charged: Failure to deliver.
Principal point involved: Breach of contract by respondent not shown.
Order: Case dismissed.

Outline of Facts

Complainant alleged that on or about Nov. 16, 1933, respondent sold to it, through a broker, one carload of head lettuce U.S. No. 1 bulge pack, firm to hard, close trimmed, at an agreed price of $1.40 per crate f.o.b., shipping point; that the car was inspected at shipping point; that the lettuce was sold on a cash basis and complainant wired a bank guarantee to the First National Bank, Caldwell; that respondent refused to deliver the lettuce and complainant was forced to buy a carload of lettuce on the open market containing 312 crates at $3. per crate, or $936.

Respondent denied having had any dealings with complainant and stated that the broker had attempted to purchase a carload of lettuce on Nov. 16, 1933, and respondent had made him a price of $1.40 per crate subject to the distinct understanding that he was to pay cash by noon Nov. 17, 1933 in the event he wanted the lettuce; that at the expiration of the time specified and no cash having been offered for the lettuce, other disposition was made of same; that later the same day a bank guarantee reached respondent's bank from complainant, "but having no deal with them and further as car had already been disposed of elsewhere, no sale could be made to said Grovier-Starr Produce Co." Complainant incorporated in the complaint by reference numerous telegrams pertaining to the alleged purchase of the car of lettuce, but these telegrams did not refute the allegations of respondent that he had agreed to sell the car to the broker if it was paid for with cash by noon, Nov. 17, 1933.

Ruling included in Decision

The Secretary held that complainant had ample opportunity to submit evidence to show a breach of the contract on the part of respondent but failed to do so and therefore the complaint must be dismissed.

S-891, Dec. 22, 1934, Docket No. 1379: (S.P.)

PALUSO-ARATA FRUIT CO., FRUITLAND, IDAHO vs. FORT DODGE GROCERY CO., FORT DODGE, IOWA.

Violation charged: Rejection
Principal point involved: Suitable shipping condition.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent one carload of extra fancy and fancy grade Delicious and Jonathan apples f.o.b. shipping point. Through its broker respondent ordered one car to be shipped under standard ventilation although the weather was extremely warm between shipping point and destination. Upon arrival of the apples at destination respondent rejected and complainant was compelled to find another purchaser with a resultant loss of $423.34, for which amount reparation was sought.

Respondent submitted evidence showing that it had accepted a carload of the same kind of apples shipped under standard ventilation from another point in the same section of the state from which complainant's car was shipped where the temperatures were even warmer and alleged that had the apples in complainant's car been in suitable shipping condition at shipping point they would also have carried to destination.

The weight of the evidence established that the apples were not in suitable shipping condition.

Ruling included in Decision

The Secretary held that the weight of the evidence established that the apples were not in suitable shipping condition and that the rejection of the respondent therefore was not without reasonable cause.

S-892, Dec. 22, 1934, Docket No. 1343: (S.P.)

CHARLES E. GIBSON, INC., MEGGETTS, S.C. vs. A.M. TOURTELLOT, PROVIDENCE, R. I.

Violation charged: Failure truly and correctly to account.
Principal point involved: No jurisdiction under original contract.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent one carload of cabbage at the agreed price of $1.40 per hamper plus ice, f.o.b. shipping point. Upon arrival of the car at destination respondent objected to its condition and asked for a discount; complainant asked respondent if he intended to abandon the car of cabbage and was informed that he did not. It was then agreed that the matter was to be left to the decision of the Produce Reporter Co. whereupon that company advised respondent to sell the car for the account of whom it may concern. Respondent sold the car and remitted net proceeds in amount $207.72, or a loss of $289.88 to complainant.

Respondent contended that the condition of the cabbage upon arrival at destination was sufficient to warrant refusal and alleged that inspection at destination showed the cabbage to have contained Black Leaf Spot with other defects.

Complainant insisted that the cabbage was in perfect condition when shipped and that the Black Leaf Spot is not a field disease but is due to defective transportation and the fact that the cabbage came into contact with the ice while in transit.

The evidence showed that the matter was submitted to the Produce Reporter Co. for decision and that both complainant and respondent agreed to the decision of the Produce Reporter Co. that the car should be sold for the account of whom concerned.

Ruling included in Decision

The Secretary held that he was without jurisdiction to rule in this case under the PACA under the original contract between the parties for the reason that they had mutually entered into a new contract.

S-895, December 29, 1934, Docket 1077: (Hearing)

G. WINTHROP COFFIN, SEATTLE, WASHINGTON vs. FORT WORTH WHOLESALE GROCER & PRODUCE COMPANY, FORT WORTH, TEXAS.

Violation charged: Rejection without reasonable cause.
Principal point involved: Abnormal deterioration at destination in f.o.b. sale.
Order: Case dismissed.

Outline of Facts

Complainant sold respondent a carload of Fancy Winesap apples at the agreed f.o.b. price of $491.40. Respondent rejected the shipment and complainant resold at a loss of $203.18. Respondent's answer to the complaint is that its rejection was justified on account of excessive decay and therefore not without reasonable cause. Complainant's reply to respondent's answer is to the effect that the apples were sold on an f.o.b. basis and that they were in A-1 condition when tendered to the carrier for transportation to the buyer. The record discloses that the purchase and sale as negotiated by the broker called for a carload of "Fancy Winesaps, cold storage stock at 65¢ f.o.b., standard ventilation." The apples shipped in compliance with the contract had been purchased by complainant on February 2 at which time they were in cold storage. Federal inspection made on that date indicated that the apples were "mostly firm, many hard, many firm ripe, no decay." The apples were again Federally inspected on March 7 after loading had been completed and certified as "mostly firm, many firm ripe, less than ½% decay." The shipment arrived at destination March 17, was Federally inspected on March 18, and certified as showing Blue Mold decay, generally in initial stages "ranging from 4% in some boxes to 44% in an occasional box of large sizes, averaging approximately 15%."

The evidence is to the effect that apples shipped from cold storage from five to six months following the packing and storage thereof will develop decay rather rapidly unless the approximate temperature of the storage plant is maintained during transit. On the other hand, the evidence also shows that other carload shipments of apples moved during this same period from the State of Washington loading points to Fort Worth, Texas, under standard ventilation, and showed only slight decay at destination. From the evidence as a whole, it can hardly be said that the apples in question were not handled under normal transportation conditions, yet the car arrived at destination showing an abnormal amount of deterioration, namely an average of 15 per cent decay, indicating that the apples were not in suitable shipping condition at time of shipment.

Respondent on brief entered contention with reference to the authority vested in the Secretary of Agriculture by Congress to act in a judicial capacity, and stated that unless the rejection was arbitrary, capricious, and designed to cheat the shipper, he had no authority to try fact questions between disputants.

Rulings included in Decision

1. In construing Section 2 of the Perishable Agricultural Commodities Act, it has been consistently held that the phrase "without reasonable cause" in connection with rejection means a refusal to accept under circumstances indicating bad faith or such a reckless or arbitrary disregard of obligations as to amount to an unfair practice. Previous decisions in several PACA cases were reviewed in this decision.

2. Respondent's refusal to accept the carload shipment of apples upon arrival at destination was justified due to the extent to which the shipment was affected by decay and the rejection was therefore not without reasonable cause.

S-896, Dec. 29, 1934, Docket 978: (Hearing)

C. F. SCHAEFER CO., YAKIMA, WASH. vs. FRANK SOVEY, CORPUS CHRISTI, TEXAS.

Violation charged: Failure to account.
Principal point involved: Storage charges not unreasonable.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it consigned to respondent to be sold for its account one carload of apples of combination Extra Fancy and Fancy grade, and "C" grade Jonathans and King David apples, from Grandview, Washington to Corpus Christi, Texas; that respondent accepted the apples and sold same for the account of complainant, rendering an account of sale on which improper and incorrect deductions were made from the gross sales price, as follows: Deduction for storage and icing, $90, less demurrage previously omitted, $4, less icing charge, $6.75.

Mr. W.B. Brooks, of the firm of Apfel and Brooks, testified that he arranged for the complainant to have the respondent handle the apples on a consignment basis; that the apples when they arrived were apparently all right, but some showed "breakdown"; that during the season of 1931 the State of Washington had considerable trouble with breakdown on all their Jonathan and King David apples; that breakdown apples are salable at first but after the breakdown begins to show up they are not; that he saw employees of respondent taking out the good apples and separating them from the bad ones; that some of the boxes of apples were absorbed in repacking them into bushels, but due to that absorption the witness did not think that 20 per cent loss on the breakdown was excessive; that basket apples were selling better than apples in boxes, and it was an advantage to change those apples from boxes to baskets, and in doing so Mr. Sovey was really

making the apples more marketable, but the apples were on the road twelve days, being overdue about four days; that respondent handled the apples to the best advantage of the consignor. Respondent testified that his power bill alone for the refrigeration was $85 or $90 per month, which was for the electricity furnished; that this did not take into account the space for storing the apples, and that $90 was a reasonable charge, and that he remitted and accounted for all the money received from the sale of the apples; that the apples were under refrigeration and storage for about two months and during that time he could have gotten $100 a month for the storage room.

Ruling included in Decision

The weight of the evidence clearly showed that due to the condition of the apples and the warm weather prevailing at Corpus Christi during the fall it was necessary to put the apples under refrigeration in storage. It required about two months to dispose of the apples, and the amount charged by the respondent for this storage was not shown to be unreasonable, and therefore the complaint should be dismissed.

S-897, Dec. 29, 1934, Docket 1388: (S.P.)

MANDELL BROTHERS, CINCINNATI, OHIO, vs. WAYNE NEWCOMB, RUPERT, IDAHO.

Violation charged: Failure to deliver.
Principal point involved: Burden of proof upon complainant.
Order: Case dismissed.

Outline of Facts

Complainant alleged that by contract in writing respondent agreed to ship complainant five carloads of U.S. No. 1 Idaho Russet potatoes, at $2.10 per hundred pounds delivered at Cincinnati; that the potatoes were to be shipped each Monday during the month of October, 1933, from the Rupert, Idaho section; that complainant advanced $100 deposit per car at the time of the contract; that the respondent failed to ship or to deliver the potatoes at the time or in the manner called for in the contract; that one car was to be shipped October 9, but was not shipped until October 10 and that on account of respondent's failure to deliver "complainant suffered loss of $100, deposit which respondent refuses to return."

Respondent denied failure to deliver on the five cars and contended that complainant unjustifiably rejected one of the cars delivered under the contract; that the contract called for five cars of U.S. No. 1 Idaho Russet potatoes for future delivery, one car each Monday in October, 1933, at $1.10 per hundred pound bags f.o.b.; that the respondent's draft on complainant for $500 was not paid and after some exchange of wires to accommodate complainant the contract was changed so as to provide for $2.10 on a delivered basis; that the car PFE 2354 referred to by complainant was loaded on the second Monday in October and the respondent telephoned the carrier accordingly; that "the conductor ran by the car by mistake and same was not picked up until Tuesday October 10"; that the potatoes should have arrived in Cincinnati early Monday morning but due to the complainant's specification of the routing did not arrive until Monday noon, and the complainant was notified at 2:05 p.m. Monday October 16; that complainant rejected the potatoes at 4:50 p.m. October 17 which was not within the 24-hour period; and that due to complainant's rejection respondent handled the potatoes for the account of complainant and suffered a loss of $167.

Complainant, although afforded ample opportunity to do so, failed to file a sworn statement supporting the allegations in the complaint. However, the evidence filed by respondent showed that the contract called for an f.o.b. shipping point basis and was not on a delivered basis. The Federal-State inspection certificate also showed that the potatoes in PFE 2354 were U.S. No. 1, size A, and otherwise complied with the specifications of the contract. The bill of lading was dated October 9, 1933 and was "changed under protest to 10th". The carrier also admitted that it did not move the car out of Rupert on the evening of the 9th but that the error was corrected by rushing the car through and it arrived in accordance with the former schedule.

Ruling included in Decision

Complainant, although afforded ample opportunity to do so, failed to file any proof in support of the allegations in the complaint and the evidence submitted by respondent refutes the material allegations made by complainant. The complaint was therefore dismissed.

S-898, December 29, 1934, Docket 904: (Hearing)

THOMAS BROTHERS, WILKES-BARRE, PA., vs. JOHN MORRIS, JR., HARLINGEN, TEXAS.

Violation charged: Failure to deliver.
Principal points involved: Complainant must establish breach of contract and damages sustained.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that it purchased from respondent one carload, consisting of 650 lugs, of U.S. 1 grade tomatoes at the agreed price of 75¢ per lug f.o.b.; that the tomatoes tendered to it by respondent in car PFE 38915 did not conform to the specifications of the contract; and that as a result of respondent's breach of contract it suffered loss and was damaged in the sum of $340.19.

Complainant, in a deposition, stated that on account of the poor condition of the tomatoes, it realized only the sum of $413.30; that the total cost of the tomatoes was $487.50 plus freight of $265.99 or the sum of $753.49; and that deducting the amount realized from the sale of the tomatoes from the total cost to it leaves the sum of $340.19 due and owing from respondent.

Respondent in answer to the complaint alleged that this was an f.o.b. sale based on U.S. grade No. 1 and that the tomatoes loaded in the aforementioned car were Federally inspected at shipping point and certified as meeting the requirements of that grade. Respondent at the hearing testified that shortly after sale of the shipment in question there was an almost daily decline in the f.o.b. market as well as in the principal receiving markets of the East.

The evidence discloses that the shipment arrived at destination June 27 on which date a restricted inspection was made and the tomatoes certified as showing an average of 12 per cent decay. The draft was paid by complainant and the tomatoes disposed of during the period June 29 through July 1. Although no effort is made to show the amount of deterioration which occurred during the period June 27 through July 1, the decay must have been rather severe in at least a portion of the lugs since a substantial number thereof were condemned on the latter date. Complainant's evidence with reference to damages suffered is so inconsistent and conflicting that it is impossible to determine the amount of damages, if any, to which it is entitled. Complainant relies largely upon the destination inspection while respondent relies upon the shipping point inspection.

Rulings included in Decision

1. In a reparation complaint involving failure to deliver, it is incumbent upon complainant to establish by a fair preponderance of the evidence both a breach of contract and the amount of damages sustained by reason thereof. In this case the complainant has done neither.

2. In the case of f.o.b. sales, greater weight should be given to an unrestricted inspection at shipping point than to a restricted inspection at destination.

S-902, Jan. 3, 1935, Docket 1384: (S.P.)

WILLIAM ISABELL CO., CANON CITY, COLO. vs. BLOTCKY DISTRIBUTING CO., INC., OMAHA, NEBRASKA.

Violation charged: Rejection.
Principal point involved: Seller can not change contract of own volition.
Order: Case dismissed.

Outline of Facts

After respondent had accepted and confirmed by wire complainant's offer to ship a carload of U.S. No. 1 cauliflower at an agreed price, complainant attempted to inject in a later telegram the condition "f.o.b. shipping point acceptance final" in code. The respondent neglected to decipher the code word calling for acceptance at shipping point, at no time consented to the added condition, and sold the cauliflower before arrival at destination believing complainant had confirmed on the basis of the telegrams originally exchanged. Upon arrival of the car at destination three days after shipment respondent had an appeal inspection made which stated that "Stock fails to grade U.S. No. 1 on account of worm injury as described above" and under quality said "practically all heads show heavy worm exudate on inside of jackets with most of such heads also showing considerable worm exudate on flowers. Green worms noted in practically all crates." The shipping point inspection was therefore reversed on appeal and Section 6, Regulation 8 of Service and Regulatory Announcements No. 93 provides inter alia that "An appeal inspection certificate which differs from the original as to grade nullifies the original". Respondent rejected the car and complainant contended that the rejection was unjustified.

Rulings included in Decision

1. The record clearly disclosed that a contract was consummated by respondent's acceptance of complainant's offer before complainant attempted to inject the "f.o.b. shipping point inspection final" into the agreement.

2. Complainant failed to establish by a fair preponderance of the evidence that a contract of purchase and sale on a basis of "f.o.b. shipping point acceptance final" was entered into or that the kind, quality and grade of cauliflower purchased by respondent was shipped by complainant to respondent. The complaint was therefore dismissed.

S-903, January 2, 1935, Docket 1401: (S.P.)

WAYNE NEWCOMB, RUPERT, IDAHO vs. MANDELL BROTHERS, CINCINNATI, OHIO.

Violation charged: Rejection.
Principal points involved: Buyer liable for damages suffered as a result of rejection without reasonable cause.
Order: Reparation awarded complainant in the sum of $67.00 with interest.

Outline of Facts

Complainant and respondent, through the Atlantic Commission Company as brokers, entered into a purchase and sale contract involving five carloads of U.S. No. 1 Idaho potatoes at $1.10 per cwt. f.o.b. shipping point, respondent to advance to complainant the sum of $100.00 per car. Upon the failure of respondent to remit the mutually agreed advance, the agreement was amended to provide for shipment on the basis of $2.10 per cwt. delivered. Respondent rejected one of the cars, PFE 2354, on arrival. Federal inspections at shipping point and destination indicated that the potatoes graded U.S. No. 1. Subsequent to rejection the shipment was resold by complainant resulting in an alleged loss to it of $167.00 less the $100.00 advanced by respondent, or a net loss of $67.00. Respondent did not file formal answer but in telegrams addressed to the Department indicated that it denied generally the allegations of the complaint and filed a counter complaint in the matter, which was handled on its merits as Docket 1388, (S-897). Complainant submitted a sworn statement of facts and evidence sufficient to show that the potatoes conformed to the specifications of the contract and that rejection was not made until after the expiration of twenty-four hours after receipt of notice of arrival.

Ruling included in Decision

Respondent's rejection was without reasonable cause rendering it liable to complainant for damages suffered as a result thereof. Complainant established that he suffered a loss of at least $67.00 on account of such rejection. Reparation was therefore awarded in that amount.

S-905, Jan. 2, 1935, Docket 1402: (Hearing)

SUNSHINE PACKING CORP., CLEVELAND, OHIO, vs. MAZO-LERCH COMPANY, WASHINGTON, D.C.

Violation charged: Rejection.
Principal point involved: Burden of proof upon complainant.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent one thousand 32-pound cans of Fancy, Red Sour, Pitted Mt. Morency cherries, at 5½¢ per pound f.o.b. Cleveland, Ohio. Upon inspection of the samples of the shipment at Washington, D.C. respondent refused to accept the cherries, assigning as a reason that they were discolored to the extent that they could not be accepted. Respondent promptly advised complainant as to the discolored character of the cherries and thereafter complainant made resale of the cherries to the Wassell Pie Bakery, at Philadelphia at a price of 4-3/4¢ per pound f.o.b. Washington, netting the sum of $918.72. Complainant contended that the cherries were of the kind, quality and grade called for in the contract and that respondent's rejection was unjustified. There was no evidence to support complainant's statement and in fact the only evidence in connection with the color of the cherries was the statement of Mr. Maurice Mazo that he "found them discolored so much so we could not accept them".

Ruling included in Decision

The evidence offered failed to support the essentials of the complaint and it necessarily follows that an order of dismissal must be entered.

S-908, Jan. 2, 1935, Docket 1239; (S.P.)

CARCIONE & CAPASALA, PITTSBURGH, PA. vs. EARL FRUIT CO., SAN FRANCISCO, CALIF.

Violation charged: Failure to deliver in accordance with contract.
Principal points involved: Condition upon arrival and weight of juice grapes shipped f.o.b., loading point inspection final.
Order: Case dismissed.

Outline of Facts

The contract in this case showed that the complainant purchased from the respondent two cars of "U.S. No. 1 Zinfandels without covenant or warranty except as hereinafter expressly set forth, at $27.50 per ton, f.o.b. California loading point. Terms, shipment and special conditions as per body of telegraphic confirmation reading as follows: 'Terms: $100 per car cash deposit, balance of invoice sight draft. Grapes to be good US#1 juice grapes, loaded not over 24 pounds to the lug average. Sugar contents of grapes 22% and over. First car to be shipped Wednesday 9/21/32. Second car Thursday 9/22/32 exclusively subject to inspection and positive acceptance loading point. * * * Seller will endeavor to make all shipments as nearly as possible on dates specified, but shall not be bound in any event to make shipments on any specified day or dates." It was further provided in this contract that the Federal-State inspection would be non-appealable and final and conclusive evidence of the character, grade, quality and condition of the fruit when shipped.

Federal-State inspection certificate at shipping point dated September 21, 1932 on car PFE 13855 showed that the grapes were U.S. No. 1 containing an average sugar content of 23.5 and otherwise conforming to the specifications of the contract of sale. The same was true of the other carload, PFE 5954 shipped on September 23rd. Apparently the complainant admitted that the grapes in both cars were U.S. No. 1 yet rejected the cars contending that they were from "poor to fair U.S. No. 1"; that inspection at destination showed they contained 3% to 5% raisining and decayed; that the grapes were loaded into refrigerator cars which had no ice in the bunkers and which had considerable to do with their becoming so badly deteriorated; that respondent refused to refund the $200 cash deposit; that car PFE 5954 was shipped on the 23rd and should have been shipped on the 22nd which made a difference in the condition of the grapes; that complainant suffered an actual loss of $173.60 on PFE 13855 and would have realized a profit of $200 had the grapes conformed to the contract and that complainant would have a profit on the other car of $200, resulting in total damages of $673.60.

It would appear that complainant considered that the grapes barely graded U.S. No. 1, which incidentally is the highest recognized grade of juice grapes, and an examination of each of the inspection certificates showed that the defects were well within the tolerance and furthermore that the sugar content was 1-1/2% higher than the 22% specified. Moreover, there is no recognized distinction between poor, fair and good U.S. No. 1. Complainant relied upon inspections made at Pittsburgh on October 4. However, these inspections were made two to three days after the grapes arrived at Pittsburgh and eleven to thirteen days from the date of the shipping point inspection, each of which was made on the day the car of grapes was shipped. As shown under the remarks the inspections made at Pittsburgh were restricted inspections. Complainant contended that if one of the cars had been shipped on September 22 instead of September 23 it would have reached Pittsburgh on Saturday, October 1st and the respondent's evidence indicates that it would have reached Pittsburgh one day later, on Sunday, October 2nd, for the reason that the car shipped September 23rd actually reached Pittsburgh on Monday, Oct. 3. It is immaterial which one is right on this point since the written contract specifically provided that the shipment was to be made as nearly as possible on the date specified "but shall not be bound in any event to make shipments on any specified day or dates." Complainant contended that the grapes were to weigh not over 24 pounds to the lug. The grapes in one car averaged 24.16 pounds and in the other car 24.32 pounds or an average excess of about one quarter of a pound on the grapes as a whole. It is impracticable to pack grapes so that they will weigh the identical amount specified and it can not be said that approximately one quarter of a pound variation on 24 pound lugs of grapes is a material departure from the specified weight of 24 pounds.

Respondent contended that low temperature prevails after nightfall in Ukiah and it has been found by experience that the fruit when loaded in a dry car with open vents and transported from loading point to Santa Rosa for icing "receives a lower temperature than if the car had been iced and vents closed" and in support of this statement introduced a sworn statement from the General Freight Agent of the carrier stating that no cars in that territory in 1932 were pre-iced at point of origin. Each of the two cars of grapes was iced at Santa Rosa and regularly iced at stations along the route to destination.

Ruling included in the Decision

The parties in their written contract agreed that the loading point inspections should be final and conclusive evidence of the grade, quality and condition of the grapes. Both carloads of grapes conformed to the specifications of the contract of sale and complainant failed to establish by a fair preponderance of the evidence that there was a breach of contract and damages resulting therefrom. The case was therefore dismissed.

S-909, Jan. 3, 1935, Docket 1312: (S.P.)

F. H. HOGUE, PAYETTE, IDAHO. vs. HENRY BAUM, KANSAS CITY, MO.

Violation charged: Rejection.
Principal points involved: In f.o.b. sale produce must be in suitable shipping condition; abnormal deterioration.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract of purchase and sale for a carload of Combination Extra-fancy and Fancy, 2½" and up, tub bushel baskets of Jonathan apples at 70¢ per bushel, f.o.b. Fruitland, Idaho. The apples were inspected at shipping point and a certificate issued showing that they complied with the contract terms. However, upon arrival at destination respondent had another inspection made which showed that the "stock is firm ripe to dead ripe, mostly ripe with 4 to 10%, average 7% internal breakdown. From 8 to 20%, average approximately 10% severe bruises scattered throughout baskets apparently due to tight pack and ripeness of stock". The inspection certificate was restricted to condition only and to accessible portion of load consisting of top layer and baskets between doorways".

Respondent thereupon rejected the car. Complainant contended that the sale was made on an f.o.b. basis and shipping point certificate showed the apples met the terms of the contract and that rejection was without reasonable cause.

The contract called for shipment under ventilation. When the parties entered into the contract of sale through the broker they agreed that the apples should be "in suitable shipping condition" as shown in Rule No. 11 of the standard memorandum of sale. Regulation 8, paragraph 10 of the rules and regulations of the Secretary of Agriculture for carrying out the provisions of this Act reads: "Suitable shipping condition" in relation to direct shipments shall be deemed to mean that the commodity, at time of billing, shall be in a condition which, when shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the destination specified in contract of sale".

Ruling included in Decision

The evidence in the case showed that the apples were handled under normal transportation service and conditions and that there was either an abnormal deterioration at the time the apples reached destination or that the apples did not conform to the specifications of the contract of sale at the time of shipment. In either case it would require a dismissal of the complaint.

S-911, Jan. 3, 1935, Docket 1357: (S.P.)

KOHLMANN BROS. & SUGARMAN, INC., NEW ORLEANS, LA. vs. ILLINOIS FRUIT GROWERS EXCHANGE, INC., CENTRALIA, ILL.

Violation charged: Failure to deliver
Principal point involved: Sale made "f.o.b. shipping point" not "f.o.b. Centralia, Ill."
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a written contract through a broker for the sale and purchase of one carload of U. S. No. 1 Elberta peaches at $1.65 per bushel f.o.b. shipping point. The peaches were shipped from Sesser, Ill. by respondent to complainant at New Orleans, and were accepted and paid for by the complainant. Complainant alleged that "In making this quotation I had every reason to believe that this car of peaches was to be shipped from Centralia, and so conveyed this belief to Kohlman Bros. & Sugarman, Inc."; that the cabbage was purchased "delivered less all charges" and that complainant therefore had no interest in the point of origin of the car; that the freight charges from Sesser were $87.09 in excess of what they would have been had the peaches moved from Centralia; that respondent failed to deliver in accordance with the contract terms by shipping from Sesser instead of Centralia and that complainant was entitled to the excess of $87.09 freight charges.

Respondent contended that the contract was not for shipment from Centralia nor was there anything in the contract requiring that the Centralia freight rate be protected but that it was an f.o.b. shipping point contract; that the respondent operates over the entire peach district in Illinois and has headquarters at Centralia from which point all telegrams and letters are sent; that the general trade understands that Centralia is the business headquarters of the respondent and that peach shipments may be made from any loading point within the peach area; that the peaches were sold on exactly the same type of contract to other parties in New Orleans and shipments made from various places; that respondent's advertisement which appeared in the "Packer" approximately August 1, 1933 (around the time this transaction occurred) is typical of all advertising in which it is plainly indicated that respondent's operations are statewide; and that complainant in 1932 bought three cars of cabbage from respondent at Centralia which were shipped from two points in the extreme northern part of the state.

The record did not show whether a claim was made by the complainant against the carrier or to the Interstate Commerce Commission for $87.09 which is the difference between the Sesser and Centralia rate to New Orleans.

Ruling included in the Decision

The evidence in the case showed that the contract of purchase was made f.o.b. shipping point and not f.o.b. Centralia, Ill.; that the respondent shipped peaches and other commodities from various places in Illinois; that Sesser is about forty miles directly south of Centralia and that respondent did not know that the freight rate was higher and had no reason to suspect that the freight rate would be higher and the complainant as well as the broker did not know this until the freight charges were paid. The complainant failed to establish by a fair preponderance of the evidence that reparation should be awarded against the respondent for the difference between the freight rate between Sesser and Centralia, Ill., and therefore the complaint should be dismissed.

S-916, January 5, 1935, Dockets 1185 and 1103: (S. P.)

BILL BAILEY COMPANY, EDEN, IDAHO vs. F. E. BALDWIN & COMPANY, CHICAGO, AND COUNTERCOMPLAINT

Violation charged: Failure truly and correctly to account.
Principal points involved: Potatoes, frozen before shipment, not in suitable shipping condition; diversion constitutes acceptance; no right of setoff when debt not arising in same capacity.
Order: Reparation awarded Bailey in the sum of $1.61.

Outline of Facts

Bill Bailey Company during December, 1932, sold respondent one carload of U. S. 1 potatoes at $187.20 f.o.b. Contract price was paid by respondent to complainant prior to arrival of the shipment. The potatoes were loaded into car PFE 9011 during extremely cold weather and during the process of loading it was discovered that a portion of them were in a frozen condition. Such sacks as showed freezing were removed from the car to the cellar, resorted and again loaded into the car. Shipment was inspected at destination by representatives of respondent and the Wesco Food Company and subsequently diverted to the latter at Charleston, West Virginia, where further inspection showed that some interspersed sacks contained frozen potatoes. The shipment was reconditioned resulting in a loss to the buyer, including labor and new sacks, of $64.61, which sum Baldwin paid to Wesco and claims from complainant herein. The record discloses that Baldwin handled other cars of potatoes for Bailey on a commission basis, on which he collected $63.00 but withheld said sum to apply on the amount due from Bailey on PFE 9011.

Respondent admitted that the potatoes in controversy were purchased on an f.o.b. basis and the inspection at destination can, therefore, be accepted only as evidence of the probable condition of the potatoes at time of shipment. The inspection made at destination in this case, however, should receive considerable consideration since it is well known by fruit and vegetable inspectors that it is altogether possible for potatoes to be in a frozen condition at the time of inspection and that such freezing occurred prior to the time of loading as certified by the inspector at Charleston, West Virginia, and yet such condition might not be detected by the shipping point inspector. The record disclosed that the weather was severely cold and the Bill Bailey Company was having considerable difficulty in preventing freezing injury at the time the car in question was loaded. The fact that frozen potatoes were found in interspersed sacks scattered throughout the carload is fairly conclusive proof that freezing did not occur in the car. The potatoes, therefore, must have been damaged by freezing prior to shipment although most likely this injury was not easily detected at the time shipping point inspection was made.

Rulings included in Decision

1. The potatoes when shipped were not in suitable shipping condition for the reason that a portion of the potatoes in many bags interspersed throughout the car had been injured by freezing before or at the time of loading.

2. Diversion of the carload of potatoes by respondent while in transit constituted acceptance but would not preclude respondent from setting up its damage as the result of complainant's breach of contract.

3. Regardless of how much respondent may have been damaged by the failure of complainant to ship the kind, quality and grade of potatoes purchased, no right or authority was thereby secured by respondent to withhold funds collected for complainant to apply on the loss thus sustained, the law being that an agent or attorney, who by virtue of special authority has received money, cannot, when sued by his principal, set off a debt due to himself in a matter not arising out of his agency. The debt not being due in the same right or capacity lacks that mutuality which is essential to the right of setoff.

4. The sum of $63 held by respondent as agent for complainant was credited against respondent's damages of $64.61 resulting from breach of contract and complainant was ordered to pay respondent the balance of $1.61 in full settlement of damages incurred.

S-922, Jan. 11, 1935, Docket 1340: (S.P.)

MERRILL LYTLE FRUIT COMPANY, MINNEAPOLIS, MINN. vs. C.S. MAYES & SON, MUSKOGEE, OKLA.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Burden of proof upon complainant.
Order: Case dismissed.

Outline of Facts

Complainant alleged that respondent through the W.A. White Brokerage Co. sold him one carload of Oklahoma bushel/Bantam Yellow Corn U.S.#1, mature, free from worms at $1.25 f.o.b. and 148 White Corn at $1.00 f.o.b. top ice extra; that upon arrival of the car the corn was badly infested with worms and on account of respondent's failure to deliver in accordance with the contract terms complainant was damaged in the sum of $325.

The evidence disclosed that the complainant did not enter into any contract of purchase and sale with the respondent. The respondent did ship on or about June 25, 1933 to the W.A. White Brokerage Co. a carload of corn and received no payment from either the complainant or the W.A. White Brokerage Co.

Ruling included in Decision

Complainant failed to establish by a fair preponderance of the evidence that a contract of sale was entered into by respondent for the sale of a carload of corn and the complaint was dismissed.

S-923 - Jan. 12, 1935, Docket 1462: (S.P.)

LEO S. BERLINER & CO., CHICAGO, ILL. vs. W.B. SHAFER INC., NORFOLK, VA.

Violation charged: Failure to account for deficit.
Principal point involved: Agent, shipping goods for undisclosed principal, liable for deficits incurred in handling consignments.
Order: Reparation awarded complainant in sum of $97.46 with interest.

Outline of Facts

Complainant alleged that it handled on commission for the account of respondent, a carload of kale resulting in a deficit of $97.46. Respondent in a formal answer stated that the complaint alleging a deficit of $97.46 "is a fraud and deception" and that complainant well knew that the kale belonged to one M.J.Simpson, a farmer of that locality, and was merely billed in its name for the purpose of diversion privileges. The evidence discloses that respondent consigned the shipment to complainant and that at the time complainant received the kale it was not aware that the shipment belonged to anyone other than respondent. However, about three hours after receiving and breaking the shipment a letter was received from respondent advising that the kale was the property of M.J. Simpson.

Ruling included in Decision

The kale was sold for the account of respondent and not for Simpson and respondent should account to complainant for the deficit.

S-926, Jan. 16, 1935, Docket 1493: (Hearing)

McDAVITT BROTHERS, BROWNSVILLE, TEXAS, vs. SPRACALE FRUIT COMPANY, PITTSBURGH, PA.

Violation charged: Rejection
Principal point involved: Respondent's rejection justified because tomatoes did not meet terms of contract.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent through McTighe Brothers, the broker, one carload of U.S. No. 1 Globe tomatoes, sizes not to exceed 50% 6x7s, balance 6x6s and larger, all good, tight, straight pack, Texas Ranger brand, at $2.00 per lug f.o.b. Texas shipping point. Due to prevailing rains complainant failed to make shipment on May 7 or May 8, 1934, (as called for in the contract of sale) and on May 9 complainant wired the broker the manifest of a load then available and asked to be advised whether "this car do for Spracale". The broker answered complainant, stating that "Spracale's buyer" was then not at Pittsburgh but that the broker believed the shipment described by complainant would be "satisfactory so bill it to him event unsatisfactory will wire immediately upon his return". Spracale had not been advised as to the shipment but upon arrival examined the tomatoes and considered purchasing at a reduction in price, but finally declined to accept the shipment as not being in compliance with the original purchase or acceptable at the reduced price offered and complainant thereafter made resale of the tomatoes which resulted in a loss claimed by complainant to be $753.21.

Ruling included in Decision

The shipment in question did not comply with size specifications of contract of sale or as to specified date of shipment as respondent did not consent to shipment on a date later than May 8. Under such circumstances respondent's refusal to accept was not a rejection without reasonable cause.

S-927, Jan. 16, 1935, Docket 1105: (Hearing)

JOHN DEMARTINI CO., INC., SAN FRANCISCO, CALIF. vs. PETER MARTORI, INC. NEW YORK.

Violation charged: Rejection.
Principal points involved: Countercomplaint involving setoff may be filed even though more than 9 months has elapsed; cantaloupes not in suitable shipping condition; complainant must return advance.
Order: Original complaint dismissed; countercomplaint allowed and complainant ordered to return advance made by respondent.

Outline of Facts

Complainant contracted to ship to respondent four carloads of cantaloupes "superior to Turlocks" on a guaranteed advance of $120 per car and payment of freight. Complainant shipped the four cars and respondent advanced $120 per car. The cars moved under standard refrigeration and without unnecessary delay but upon arrival at destination an average of approximately one-third was decayed, the decay ranging from an average of 8% in the carload showing the least damage to 50% in the car which was in the worst condition. Respondent thereupon rejected the cars which were sold for freight charges by the railroad, the amount realized being $977.54 less than the freight charges. Since respondent refused to pay this amount complainant became liable on its bond with the railroad company. Complainant claimed the rejection was without reasonable cause and sought reparation in the amount it was compelled to pay the railroad company. Respondent claimed that the certificates issued by the private inspection service at destination showed the cars not to have been in suitable shipping condition and that for this reason their rejection was justified. Complainant had not obtained any inspection on the cars at shipping point and such evidence as complainant presented was not deemed to possess greater weight than that furnished by the inspection certificates at destination. It was held that the evidence clearly indicated that the cantaloupes were not in suitable shipping condition.

Respondent in its answer set up as a defense not only the allegation that the cantaloupes were not in suitable shipping condition but that it was entitled to reimbursement for the amount of the advance made on the cars. Complainant contended that this countercomplaint was filed more than 9 months after the cause of action accrued. The Secretary held that this was immaterial and that the claim was not barred unless it had accrued more than 9 months prior to the commencement of this proceeding.

Rulings included in Decision

1. The deposition of an employee of complainant who supervised the packing and loading of the melons, and of a disinterested party not shown to be qualified as an inspector of fruits and vegetables who testified more than two years later that the melons were Grade US-1, can not be considered of sufficient weight to offset the testimony of the inspector and other witnesses who testified as to the condition of the melons at destination.

2. The statute stops running against a setoff at the date of the commencement of the action in which it is pleaded; the date of pleading a set off is immaterial. Respondent may rest upon his rights to assert a counterclaim until the time comes to assert it in his answer without its being subject to any other defense than it would have been subject to at the time of the commencement of the proceeding by the filing of the complaint. If the statute of limitations has not run against respondent's claim at the time of the filing of the complaint, it may be set up in the answer even though the statutory period of time has elapsed before the answer is filed.

3. Complainant ordered to return the amount of advance.

S-929, Jan. 17, 1935, Docket 1300: (S.P.)

PACIFIC FRUIT & PRODUCE CO., SEATTLE, WASH., vs. GILINSKY SONS CO., OMAHA, NEBR.

Violation charged: Rejection without reasonable cause.
Principal point involved: F.O.B. acceptance final precludes later rejection.
Order: Complainant awarded reparation in the sum of $233.80, with interest.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of a carload of potatoes. O.C. Timmons Distributing Co. acted as agent and both parties relied upon the telegrams leading up to the sale of the potatoes on July 24, 1933 and the provisions contained in the standard memorandum of sale executed by the broker. Upon arrival of the car at destination respondent rejected relying upon the Federal certificate issued at Omaha on July 27, 1933. Complainant relied upon the Federal-State inspection certificate dated July 20, 1933 at shipping point. The telegrams which were material to the question at issue were as follows: July 22, Timmons to Pacific Fruit, "SOLD GILINSKY CAR USONE COBBLERS ROLLING OR TODAY SHIPMENT $1.28 FOB CONFIRM QUOTE MORE"; July 22, Pacific Fruit to Timmons "COBBLER MARKET HIGHER TODAY NOW TWO DOLLARS HAVE CAR OUT TWENTIETH PFE 71425 CERTIFICATES READ GENERALLY ONE SEVEN EIGHTS TO FOUR INCHES DIAMETER MOSTLY TWO TO THREE AND ONE QUARTER LESS THAN TWO PERCENT UNDER ONE AND SEVEN EIGHTHS FAIRLY MATURE FIRM CLEAN GENERALLY SMOOTH NO DECAY GRADES USONE FOB ACCEPTANCE FINAL SUBJECT APPROVAL DETAILED FEDERAL INSPECTION CERTIFICATE BY WIRE"; July 22, Timmons to PACIFIC FRUIT, 7:55 p.m. "O.K. GILINSKY SUBJECT APPROVAL GOVERNMENT INSPECTION CAR OUT TWENTIETH WIRE COMPLETE INSPECTION QUOTE COUPLE MORE";July 23, Pacific Fruit to Timmons "GILINSKY GENERALLY ONE SEVEN EIGHTHS TO FOUR INCHES IN DIAMETER MOSTLY TWO TO THREE ONE FOURTH INCHES IN DIAMETER LESS THAN TWO PERCENT UNDER ONE SEVEN EIGHTHS INCHES IN DIAMETER POTATOES FAIRLY FIRM CLEAN GENERALLY SMOOTH DEFECTS OF GRADE WITHIN TOLERANCE NO DECAY USONE PFE 71425 BOOKED UP AT PRESENT TRY QUOTE TOMORROW"; July 24, 8:30AM Timmons to Pacific Fruit, "OKAY GILINSKY COUNCIL BLUFFS IOWA PROVIDED WELL MATURED CONFIRM PFE 71425 QUOTE FOR IMMEDIATE SHIPMENT"; July 24, Pacific Fruit to Timmons, 8:15 AM "CONFIRM GILINSKY COUNCIL BLUFFS FOB ACCEPTANCE FINAL SUBJECT APPROVAL DETAILED FEDERAL INSPECTION CERTIFICATE BY WIRE AS PER ORIGINAL AGREEMENT ADVISE". In the memorandum of sale under the term "special agreement" it was stated "accepted on wired Government inspection." After this statement there was given an excerpt from the inspection certificate which read: "Generally one seven eights to four inches diameter mostly two to three and one quarter less than two percent under one and seven eighths fairly mature firm clean generally smooth no decay grades U.S. No. 1". The memorandum of sale gave a substantially accurate quotation from the inspection certificate at point of origin. The respondent, however, relied upon the Federal inspection certificate made at Omaha under date of July 27 at 2P.M. This inspection was limited to condition only and did not find that the potatoes did not grade U.S. No. 1. Respondent also contended that there was an unreasonable delay on the part of the complainant in disposing of the potatoes between July 27 and August 2 when they were shipped to Minneapolis for resale.

Rulings included in Decision

Under the special agreement in the memorandum of sale this became an f.o.b. acceptance final and since the Government inspection was wired to respondent and indicated that the car met the terms of the contract, respondent was bound thereby.

Complainant, during the time which elapsed between rejection and resale, was endeavoring through the broker to have the respondent accept the potatoes and did not ascertain definitely that respondent would not reconsider its rejection until August 1. Under the circumstances it could not be said that there was an unreasonable delay on the part of complainant in making a resale. Complainant was awarded reparation in the difference between the original price and the resale price.

S-932, Jan. 22, 1935, Docket 1494: (S.P.)

KNAEBEL PRODUCE COMPANY, PITTSBURGH, PA. vs. DeZAUCHE, INC., OPELOUSAS, LA.

Violation charged: Failure to deliver.
Principal point involved: Complainant must prove case.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract whereby respondent was to ship to complainant "one car U.S. #1 Kilndried Porto Rican Sweet Potatoes in crates clean bright stock -- full tight pack -- @ $1.37½ crate DELIVERED." The potatoes were to be shipped under standard ventilation and the memorandum of sale was dated December 9, 1933. The Federal-State inspection certificate at shipping point read in part: "Stock is firm, clean, bright, fairly smooth and fairly well formed. About 5% grade defects consisting mostly of misshapen and bruises. Grade: U.S. No. 1". The sweet potatoes were inspected twice after arrival. The first inspection made on December 13 showed that the potatoes were "fairly clean mostly dark colored occasional clean and bright potatoes have an aged appearance". The second inspection was made December 14 and read: "Examined a number of crates in various parts of load and find from 5 to 15% decay mostly stem end mold forming at decay spots." The complainant accepted the potatoes and paid for them but contended that they did not meet the specifications of the contract and that complainant was thereby damaged in the sum of $380.97. Respondent contended that the potatoes were U.S. No. 1 and met the terms of the contract; that they were inspected upon arrival on December 13 and then found to be sound and to meet the specifications of the contract of sale; and that they were unloaded by complainant and paid for several days thereafter.

The complainant was called upon to furnish a sworn statement in support of the complaint but failed to do so and the only evidence offered were the statements made above of the inspections upon arrival.

Ruling included in Decision

Complainant failed to establish by a preponderance of the evidence that the sweet potatoes did not conform to the specifications of the contract and the case was therefore dismissed.

S-938, Feb. 2, 1935, Docket 657: (Hearing)

SANZONE-PALMISANO CO., CINCINNATI, OHIO, vs. DAWN MARKETING CO., YOAKUM, TEXAS.

Violation charged: False and misleading statement.
Principal points involved: Car shipped day later than represented by shipper; complainant must prove damages.
Order: Complainant awarded nominal damages of $1.00.

Outline of Facts

Respondent, through an exchange of telegrams, sold complainant a car of tomatoes. Respondent wired complainant from Yoakum, Texas, June 7, 1931 stating the manifest and that the car was "out last night". At the time the telegram was sent the car was not in fact fully loaded but had only been partially loaded at Flatonia, Texas and the loading was to be completed at Giddings, Texas. The loading operations at Giddings resulted in a delay in shipment of approximately twelve hours and had the car been fully loaded on June 6 so that it could have moved forward to destination it would have arrived at Cincinnati on June 11, 1931, the date on which complainant expected the car, but on account of such delay at Giddings it did not arrive at destination until June 12, 1931. It was clear, therefore, from the evidence that there was a delay of one day in arrival of the car at destination but complainant's proof of loss sustained on account of such delay was not clear. He claimed loss in the sum of $113.40 which he said was based on the difference in market quotations on this commodity between the dates of June 11th and June 12. However, the complainant failed to definitely show what difference, if any, there was in the market value of Texas tomatoes at Cincinnati, Ohio, between June 11, and June 12, 1931.

Rulings included in Decision

1. Respondent's wire of June 7 that the car was "out last night" meant that the car had been delivered to the railroad company in a completely loaded condition on June 6 and therefore was false and misleading.

2. The evidence was insufficient to support a reparation award in complainant's favor and therefore only nominal damages in the sum of $1.00 could be awarded.

S-941, Feb. 4, 1935, Docket 1431: (S.P.)

PUPILLO FRUIT COMPANY, ST. LOUIS, MO. vs. EGIDIO CICCOLELLA, ALBANY, N.Y.

Violation charged: Rejection
Principal point involved: Buyer must pay for produce meeting contract terms
Order: Reparation awarded complainant in the sum of $430.52, with interest.

Outline of Facts

Complainant by contract in writing sold to respondent through Richman & Samuels, New York, and General Distributors, Inc., of Albany, brokers, "one carload of U.S. No. 1 table seedless grapes at 70¢ per lug, f.o.b. Sweet Sue Brand". The broker's standard memorandum of sale, dated October 3, 1933, was executed by the General Distributors, Inc. Upon arrival of the car at Albany respondent ordered the removal therefrom of 35 lugs for purposes of delivery to the trade and not for inspection. Shortly thereafter on the same day respondent notified the Albany broker of his refusal to accept the car. The complainant through the New York broker diverted the car immediately upon notice of rejection, less the 35 lugs which it did not know had been removed from the car, and upon resale received the net proceeds of $275.08. There was neither government nor state nor other recognized inspection of the grapes at destination. There was no official inspection at shipping point but complainant furnished sworn statements of eleven persons as follows: "we packed and handled and inspected grapes in car PFE 29808, shipped September 23, 1933, and that they were better than U.S. No. 1 Table grapes and as good grapes as were shipped during the season of 1933." Respondent contended he rejected the grapes because they were "loose pack so that they had been bruised considerably" and that "they seemed to be of short weight". A certificate of the Transcontinental Freight Bureau dated Sanger, Calif. Sept. 23, 1933 showed the average gross weight of the lugs as 28 lbs and the net weight 25 lbs.

Ruling included in Decision

The evidence indicated that complainant complied with the terms of the contract and that respondent's rejection of the grapes was without reasonable cause and in violation of the Act. Reparation was awarded complainant in the sum of $430.52, which was the difference between the original price and the amount received upon resale.

S-943, Feb. 6, 1935, Docket 1512 and 1512-A: (S.P.)

CARUSO PRODUCE COMPANY, INC., SYRACUSE, N.Y. vs. A.C. WILKINS, INC., KINGSTREE, S.C. and countercomplaint.

Violation charged: Failure to deliver.
Principal point involved: Complainant must prove damages claimed.
Order: Complaint and countercomplaint dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of 600 tubs of Clark's long green cucumbers at $1 per tub, plus $30 brokerage, or a total sum of $630, to be shipped by express to complainant at Syracuse. On June 6, 1934, 600 tubs of cucumbers were shipped by respondent and transferred to express car Southern 129 at Columbia, S.C. to complainant at Syracuse. Respondent drew a draft on complainant for $630 and the draft was honored for the full sum called for, but soon thereafter payment was stopped by complainant who contended that the cucumbers received did not meet contract specifications. Complainant requested damages, for respondent's failure to deliver cucumbers in accordance with the terms of the contract, in the sum of $630, plus $210 which it was claimed was the difference between the contract price and the market price, or a total of $840.

The respondent denied that the contract called for Clark's long green fancy graded cucumbers or that the cucumbers failed to meet contract requirements. On arrival of the car it was rejected by complainant and later sold at the request of the Railway Express Agency for the gross sum of $89.50. Respondent claimed damages of $630.00.

Rulings included in Decision

1. Respondent failed to ship the kind and quality of cucumbers called for in the contract of purchase and sale. Complainant's rejection therefore was not without reasonable cause.

2. Complainant did not sufficiently show any certain amount of damage actually sustained. The loss of profits might have been considered a proper measure of damages if sufficient proof had been furnished showing the prevailing market price for Clark's cucumbers at the time this controversy arose, but a computation of this nature can not be based upon the unsupported statement of complainant or its employees. Both the complaint and countercomplaint were therefore dismissed.

S-946, Feb. 12, 1935, Docket 1457: (S.P.)

WESCO FOODS COMPANY, CHICAGO, ILL. vs. MOUNTAIN STATES DISTRIBUTORS, INC., DENVER, COLORADO.

Violation charged: Failure to account.
Principal point involved: Set-off allowed.
Order: Reparation awarded complainant in the sum of $76.06 with interest.

Outline of Facts

Respondent sold to complainant a carload of potatoes on a delivered basis at St. Louis, Mo., which did not conform to the contract of sale due to excessive decay. Upon arrival of the potatoes the respondent authorized the complainant to have them accepted by the Kroger Grocery Company promising protection on account of decay and the necessary labor in reconditioning the potatoes. Complainant alleged that there was a loss of $159.20 which it paid to the Kroger Grocery Co. There was some dispute between complainant and respondent as to the actual loss incurred by complainant.

The evidence showed that in reconditioning the potatoes there was a loss of 40 bags which at $2.05 per bag amounted to $82, and labor of 168 hours which at 40¢ per hour amounted to $67.20, or a total loss of $149.20, which was the amount of loss sustained by complainant on the potatoes. However, during the same month that the transaction herein took place, the complainant sold to the Kroger Grocery & Baking Co. six carloads of potatoes on which respondent was required to pay additional switching charges amounting to $73.14 which should have been paid by complainant. A set-off of $73.14 should be allowed and deducted from the damages of $149.20 referred to above, leaving $76.06 owing to complainant by respondent.

Ruling included in Decision

Respondent failed truly and correctly to account to complainant in the net sum of $76.06. This amount was awarded complainant, with interest, as reparation.

S-950, Feb. 15, 1935, Docket 1456: (S.P.)

SAW GRASS FARMS, INC., NEW YORK, N.Y. vs. SPADA FRUIT COMPANY, INC., TAMPA, FLA.

Violation charged: Failure to truly and correctly account.
Principal point involved: Buyer instructed to turn over portion of money to third firm which seller owed.
Order: Complainant awarded reparation in the sum of $407.45, with interest.

Outline of Facts

Complainant and respondent entered into a contract under which the respondent sold for the account of the complainant ten carloads of cabbage. Complainant gave written authority to the respondent to deduct from the net proceeds of the sale of the cabbage $585.55 and to pay this amount to the Peninsular Distributing Corp., but respondent paid $993 to that corporation. Complainant objected to respondent deducting brokerage charge on the cars. Respondent contended that he was authorized by complainant to pay the amount which the latter owed to the Peninsular Distributing Corp. and that respondent did this and no complaint was made until nearly a year had elapsed. However, respondent failed to establish by a fair preponderance of the evidence that the written authorization was changed so as to authorize the respondent to pay an additional amount of $407.45 to the Peninsular Distributing Corp. Respondent was entitled to brokerage of $20 on each car but only charged $180, omitting to charge brokerage on one car apparently through oversight.

Ruling included in Decision

Respondent failed to account truly and correctly to complainant for the balance of the net proceeds amounting to $407.45. Reparation was awarded complainant in this amount, plus interest.

S-953, Feb. 18, 1935, Docket 1513: (S.P.)

CUMMINGS BROKERAGE CO., BELLE GLADE, FLA., vs. B.M. KNOBEL, WASHINGTON, D.C.

Violation charged: Failure to account.
Principal point involved: Broker who acted only in that capacity not responsible for purchase price.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold respondent a car of beans f.o.b. Florida; that respondent accepted the beans in compliance with the contract of sale and diverted the car to a Pittsburgh dealer but has refused to pay the purchase price.

Respondent maintained that it functioned only as broker; that to avoid any misunderstanding he wired complainant that "he did not offer $2.10 but wired had offer of $2.10"; that on behalf of respondent he sold car to a Pittsburgh dealer; that on arrival at Pittsburgh the beans were badly frozen and damaged due to neglect and delay on part of the carrier; that to avoid further loss he asked the Pittsburgh dealer to handle to the best advantage; that complainant's interests were fully protected for claim purposes; that upon surrender of the bill of lading and the signing of a waiver of interest in the claim by complainant more than full recovery could be had.

The evidence showed that the beans were finally sold and the net proceeds therefrom were remitted to complainant.

Rulings included in Decision

1. Respondent did not purchase or agree to purchase the beans but was acting at all times in the capacity of a broker.

2. Due to cold weather in Washington the latter part of February, 1934, when the beans arrived it was impracticable to inspect and unload, and respondent acting for the best interest of complainant arranged for diversion, keeping complainant fully advised. The complaint was therefore dismissed.

S-957, Feb. 19, 1935, Docket 1513-A: (S.P.)

CUMMINGS BROKERAGE CO., BELLE GLADE, FLA. vs. B.M. KNOBEL, WASHINGTON, D.C.

Violation charged: Failure to account.
Principal point involved: Broker who acted only in that capacity not responsible for purchase price.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold respondent a car of beans; that upon arrival in Washington, D.C. the respondent could not resell the beans and offered to divert the car to Hartford, Conn; that the beans were diverted by complainant about 48 hours after arrival at Washington and sold at a loss.

Respondent alleged that it acted only as a broker; that weather conditions when the beans reached Washington were such as to prevent inspection and sale and complainant was advised; that complainant notified respondent that it was holding him responsible for the car and not to divert the beans until further notice; that respondent then endeavored to sell the beans in Washington but when a prospective purchaser was obtained complainant had already diverted the beans. The evidence submitted supported the allegations of respondent.

Ruling included in Decision

Respondent agreed to handle the beans on a brokerage basis and made no guarantee at any time that they would be sold at a different price. Complaint was dismissed.

S-961, Feb. 25, 1935, Docket 1580: (S.P.)

J.E. NELSON, ALTOONA, PA., vs. HAROLD T. CHRISTIAN & CO., HUNTINGTON, W.VA.

Violation charged: Failure to account.
Principal point involved: Commission merchant entitled to deduct from proceeds on cars handled for account of shipper a deficit on another car handled for account of same shipper.
Order: Case dismissed.

Outline of Facts

Complainant charged that respondent had sold for his account two cars of potatoes rendering a true and correct account sales therefor, but withholding payment in that an unwarranted deduction of $180 was made. Respondent admitted deducting $180 from the net proceeds, stating that this was withheld because on another car the complainant had first agreed to protect the purchaser against loss which amounted to $180 and then had refused to make good on the guarantee. Complainant admitted making such a guarantee and attempted to justify refusal to pay the amount because the loss was not reported immediately and hearing nothing further complainant had settled with the grower.

Ruling included in Decision

In addition to the two cars involved in this complaint respondent had handled a prior car. It was so badly frosted that respondent obtained from complainant a guarantee to protect the purchaser against loss. There was delay in advising the exact amount of the loss due to the fact that this could not be determined until all the potatoes were sold. However, the complainant had been promptly advised that there would be a loss and respondent was justified in deducting this loss from the proceeds of the other two cars. The complaint was therefore dismissed.

S-964, March 6, 1935, Docket 1557: (S.P.)

M. DECOLA, McDONALD, PA., vs. H.H. MILES & CO., NEW YORK, N.Y.

Violation charged: Failure to deliver.
Principal points involved: Facts strongly suggest misinformation to respondent in order to force down his price; complainant failed to prove any loss.
Order: Case dismissed.

Outline of Facts

Complainant alleged that on June 21, 1934, it agreed to buy from respondent a car of U.S. No. 1 Cobbler potatoes in 100 lb. bags at $1.25 per bag, delivered at McDonald, Pa. total sale price being $125, shipping point North Carolina; that the purchase was negotiated through the Tri-State Sales Agency who acted as broker for both parties; that on June 22 the broker telephoned complainant that the shipper "did not get the car out that day (June 21) but would ship it on June 22; that complainant then advised the broker that several brokers had quoted him $1.20 delivered for June 22 shipment and under the circumstances would expect respondent to take care of the price; that the broker then phoned that respondent was billing the car at $1.20 delivered; that delivery was not made and complainant was obliged to pay $1.45 delivered thereby suffering a loss of $75.

Respondent contended that on the 21st he agreed to sell a car of potatoes to respondent at $1.25 per sack but on the 22nd the broker wired that complainant wanted to buy at $1.20 and that they could buy plenty of potatoes at $1.20 per sack and respondent agreed to confirm if that was the market; that after investigation respondent could not learn of any dealers selling for less than $1.25 per sack and wired broker "***not confirming any sax at one twenty today one quarter is bottom for me they can rot first"; that complainant used lax judgment in buying elsewhere at 25¢ per bag higher as "any number of carlots could have been purchased in the Aurora section on June 22 at $1.25 delivered to points taking Pittsburgh freight rates"; that respondent did not agree to ship Decola a car of potatoes at $1.20 McDonald, Pa.

Complainant, in support of his contention that he "was obliged to pay $1.45 delivered for potatoes" submitted three receipted invoices for 100 sacks each of potatoes "which I was forced to purchase due to nondelivery of potatoes purchased by me from H.G. Miles & Co." These invoices were dated June 22, 25 and 29. The accredited market reports for the Pittsburgh vicinity from the 22nd to the 29th showed that potatoes in that vicinity were at least not higher than $1.25. The question naturally arose, if there were plenty of cars available on the 22nd at $1.25 why did complainant pay $1.45 for 100 sacks on that date. The Secretary stated that the facts strongly suggest misinformation to respondent in order to force down his price and that complainant's obligatory purchase of 100 sacks on the 22nd justifies the assumption that he was informed of respondent's failure or refusal to ship and that such information came to him from his broker who had received respondent's telegram of the 22nd stating that $1.35 was its bottom price. Respondent was ready and willing to deliver at that price. In short, complainant asserted that he could get carlots of potatoes at $1.20 on the 22nd, and he knew on that date that respondent declined to ship at that price. Why did not complainant buy a car at that price on that day? The Secretary held that without a satisfactory answer to that question complainant's case must fail.

Ruling included in Decision

Complainant did not suffer any damages in consequences of the failure of respondent to deliver the car of potatoes referred to and was not entitled to reparation from respondent on account of such failure to deliver. The case was therefore dismissed.

S-967, March 6, 1935, Docket 1582: (S.P.)

FRUIT SALES INCORPORATED, WENATCHEE, WASH. vs. CITY PRODUCE COMPANY, HAZLETON, PA.

Violation charged: Rejection.
Principal points involved: Complainant must prove case; car of apples bought to be "like last delivered".
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent a car of apples fancy winesap apples of sizes 163s and larger, natural run, at $1.85 per box, delivered at Hazleton; that the apples were inspected at Wenatchee, Wash., point of shipment, on May 10, 1934 and reinspected at Philadelphia on or about May 24, 1934 by the Binney Inspection Service, Inc.; that complainant shipped apples in compliance with the contract of sale but respondent rejected same without reasonable cause and complainant resold the car for respondent's account at auction at Philadelphia.

The evidence was conflicting. However, it appeared that the contract called for a car of fancy winesaps like the last delivered (the car "last delivered", referred to here, having been shipped on April 13, 1934). The Federal-State inspection certificate dated April 13, 1934, read in part: "Majority of apples are firm, many firm ripe. Two per cent Blue Mold rot, various stages." The Federal-State shipping point inspection dated May 10, 1934 on the car of apples in controversy read in part: "Apples are mostly firm ripe, few ripe. Two per cent Blue Mold rot, various stages." The Secretary held that the first car of apples was substantially better than the second car because apples which are "firm, many firm ripe" will stand up under shipment materially better than apples where the majority of them are "mostly firm ripe, few ripe"; that since this was a sale on a delivered basis, the respondent was vitally interested in the apples conforming to the specifications of the contract of sale upon arrival. The inspection made by respondent and a representative of the Pennsylvania Railroad Co. on May 21, 1934 at Hazleton states that there was an average of approximately nine per cent decay. However, the inspection made for complainant at Philadelphia on May 24 showed an average of two per cent decay. The Secretary held that these inspections were inconsistent since the apples could not average 9 per cent at Hazleton on May 21 and 2 per cent at Philadelphia on May 24. Neither the complainant nor the respondent obtained a Federal inspection at either Hazleton or Philadelphia and it was impossible to determine which inspection was correct.

Ruling included in Decision

It is incumbent upon the complainant to establish by a fair preponderance of the evidence that the apples conformed to the specifications of the contract of sale. This the complainant failed to do and the case was dismissed.

S-969, March 6, 1935, Docket 1589: (S.P.)

K.B. POCOCK, CLEVELAND, OHIO. vs. MARTIN VEGETABLE CO. INC., ROBSTOWN, TEXAS.

Violation charged: Failure to account.
Principal point involved: Deficit incurred on consignment transaction.
Order: Reparation awarded complainant in the sum of $90.73.

Outline of Facts

Respondent consigned to complainant two carloads of vegetables, one containing cabbage and the other containing cabbage, turnips and carrots. Complainant sold the cars for the account of the respondent for the highest prices it was able to obtain but after deducting expenses incurred in the sale and drafts of $300 which complainant had paid there remained a total deficit on the two cars of $90.73. Respondent admitted the truth of complainant's allegations and stated that "we owe this and intend to pay it out of the first money we have."

Ruling included in Decision

Respondent's failure to pay the deficit incurred in the sale of the two cars by complainant was a violation of the Act. Complainant was awarded reparation in the sum of $90.73, with interest.

S-970, March 7, 1935, Docket 1503: (Hearing)

WASHINGTON VEGETABLE GROWERS' ASSOCIATION, INC., AUBURN, WASH. vs. MOTOR CITY PRODUCE COMPANY, DETROIT, MICH.

Violation charged: Rejection
Principal point involved: Suitable shipping condition of lettuce.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent through the W.A. White Brokerage Co. of Detroit, Mich. as agent for both parties, two carloads of U.S. No. 1 Iceberg head lettuce at $2.75 per crate, f.o.b. Auburn, Washington, cost of top ice extra. Federal-State inspection of the lettuce at shipping point showed that both cars graded U.S. No. 1 and met the terms of the contract. However, Federal inspection made at destination showed that one car failed to grade U.S. No. 1 on account of bruising and the other failed to grade US-1 only on account of decay. The lettuce was condemned by the State Board of Health as unfit for consumption, presumably because of snails, slugs and insects found. In this connection the Federal inspector at destination stated that he found "some bugs in one car and snails in the other, but not enough to affect the grade".

The evidence showed that the two cars moved under normal transportation conditions, and it appeared that the discolored condition of the outer leaves was caused by bruising and probably to some extent by the presence of insects. The decay reported as Bacterial Soft Rot, averaging 12% in one car, indicated a development of a latent defect that existed at time of loading. The broker's memorandum of sale contained a "Suitable shipping condition" clause that the commodity at time of billing "shall be in a condition which, when shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the destination as specified in the contract of sale;" that "Suitable Shipping Condition in connection with reconsigned or rolling cars shall be deemed to mean that the commodity, at time of sale, shall meet the requirements of the definitions of this phrase provided for application to direct shipments". These cars were rolling at the time of this transaction.

Ruling included in Decision

The evidence indicated that the lettuce, at time of billing, was not in suitable shipping condition and therefore respondent's refusal to accept was not a rejection without reasonable cause within the meaning of Section 2 of the Act. The case was dismissed.

S-973, March 20, 1935, Docket 1301: (S.P.)

PACIFIC FRUIT & PRODUCE CO., LOS ANGELES, CALIF. vs. T.L. BARRON PRODUCE CO., DELRAY BEACH, FLA.

Violation charged: Failure to pay brokerage.
Principal point involved: A party may not act as a purchaser and a broker in the same transaction.
Order: Case dismissed.

Outline of Facts

Complainant alleged that the International Fruit Distributors of Los Angeles, Calif., acting as brokers for respondent sold to the complainant two carloads of beans f.o.b. shipping point; that the reasonable and agreed compensation to be paid by respondent to complainant doing business as the International Fruit Distributors was $50; that complainant paid for the use and benefit of respondent upon the last car of beans the sum of $3.75 to the railroad company as detention charges and that respondent was indebted to complainant for the total sum of $53.75.

The evidence disclosed that the complainant is a corporation and bought the two carloads of beans from the respondent through the trade name and style of International Fruit Distributors. No answer was filed by respondent. Both carloads were bought f.o.b. shipping point and were shipped from Delray Beach, Fla. to Los Angeles. There was no evidence submitted that these detention charges of $3.75 accrued at point of shipment and therefore this claim was not allowed.

Rulings included in Decision

1. A party may not act as a purchaser and a broker in the same transaction and thereby secure the produce as a purchaser at the lowest price possible and at the same time charge a brokerage fee which contemplates that the broker will sell the produce at the best possible price. See Baker Bros. vs. West Virginia Brokerage Co. PACA Docket No. 10, S-4, where it was held that the broker is "under a duty to use every reasonable effort to secure the best price possible for the produce"; that complainant is no more entitled to brokerage for the beans bought by it through the name of the International Fruit Distributors than if it had bought the beans direct from the respondent without using the name of the International Fruit Distributors.

2. Neither the brokerage charges nor the detention charges were allowed. The case was dismissed.

S-974, March 20, 1935, Docket 1449: (S.P.)

M. TOPLITZKY & COMPANY, INC., DENVER, COLO., vs. S.A. SHERWOOD, LOS ANGELES, CALIF.

Violation charged: Failure to deliver.
Principal point involved: Potatoes sold inspection on arrival.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it bought two carloads of potatoes from respondent; that upon arrival the potatoes were in a decayed and rotted condition and complainant suffered a loss of $250.88.

The potatoes were sold subject to inspection and acceptance at Denver. Upon their arrival on July 17 the complainant requested protection for decayed potatoes and the respondent advised that no allowance would be made and if complainant did not accept the potatoes they would be diverted. The complainant accepted the potatoes and paid the full purchase price. The evidence also showed that no representations were made as to the condition, grade, or quality of the potatoes and that at the time the sale was made and the arrival of the potatoes at Denver the respondent did not know the grade or quality of the potatoes and therefore sold them subject to inspection.

Ruling included in Decision

Under the circumstances, and particularly in view of the fact that the respondent promptly advised complainant that no protection would be given for any decayed potatoes, the complainant should have rejected if upon inspection they were not found to be satisfactory and thereby have given the respondent an opportunity to divert the potatoes. Complainant, however, elected to accept the potatoes and pay the full purchase price after being advised that no allowance would be made, and the complaint therefore should be dismissed.

S-980, March 29, 1935, Docket 1473: (S.P.)

EVERETT G. DARROHN, SCOTTSVILLE, N.Y. vs SIEGLER & SWAIN COMPANY, PHILADELPHIA, PA.

Violation charged: Rejection.
Principal points involved: Complainant must prove case; freezing injury to cabbage; shipping precautions to keep cabbage from freezing.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract through a broker for the purchase and sale of one carload of good, merchantable Danish cabbage at $42 per ton, or $504. Respondent rejected the car stating that it did not meet the contract terms in that there was freezing injury, and complainant resold claiming damages in the sum of $303.10.

Complainant contended that the cabbage was "put up right and loaded right." Respondent claimed that, considering the cold weather, complainant failed to exercise reasonable care, prudence and caution in preparing the car for shipment. An inspector of the Binney Inspection Service, who inspected this cabbage, testified by deposition that "all sacks examined from various locations in the load showed nearly all heads frozen two leaves deep to many frozen solid", and that he did not think the shipper protected the cabbage in controversy in conformity with the usual manner and practice in such cases. Depositions were submitted by both parties as to the condition of the car for protection against freezing. The evidence was conflicting on the question at issue as to whether reasonable and customary precautions were taken by the shipper to protect the cabbage against freezing.

Ruling included in Decision

The Secretary held that the cabbage arrived in Philadelphia with severe freezing injury found throughout the load, and that it is incumbent upon the complainant to establish by a fair preponderance of the evidence that he exercised reasonable care in protecting the cabbage from freezing. Complaint therefore was dismissed.

S-985, April 5, 1935, Docket 1504: (S.P.)

I.E. HELFMAN, SHARON, PA., vs. H.G. MILES & CO., NEW YORK, N.Y.

Violation charged: Failure to deliver.
Principal point involved: Complainant must prove damages.
Order: Case dismissed.

Outline of Facts

Complainant entered into a contract, through the Tri-State Sales Agency acting as broker, with respondent for the purchase of a car of U.S. No. 1 Cobbler potatoes, at $1.25 per bag delivered. The car was to be shipped on the 21st of June. Respondent wired its inability to ship on the 21st but stated he could make shipment on the 22nd. Complainant then advised the broker that he had a quotation at $1.20 delivered and would expect respondent to meet that price. Respondent, upon being urged by the broker, agreed to $1.20 provided that was the market price, but upon finding that the market was not less than $1.25 telegraphed that $1.25 was the bottom price and respondent was ready and willing to deliver at $1.25. Complainant contended that he pressed the broker for information as to the car and getting no satisfaction bought a car from Leo G. & A.N. Altmayer, brokers, at $1.15 f.o.b., which figured $1.57 delivered, and requested damages in the difference between the price he paid for the substitute car and the contract price of $1.25 per bag.

The Secretary held that regardless of whether there was a breach of the contract by either party the facts appeared that the market for potatoes in the Pittsburgh area, according to accredited market reports, from June 21 to June 29 declined and then arose, but at no time between those two periods was the market any higher than it was at the time the contract was entered into. Furthermore the complainant's own statement indicated that he was able to purchase potatoes apparently equivalent in quality and brand for less than the contract price. It was not apparent therefore upon what basis complainant could justly seek reparation for damages on account of his failure to receive potatoes from respondent as agreed.

Ruling included in Decision

Complainant did not suffer any damages in consequence of the failure of respondent to deliver the car of potatoes and was not entitled to reparation from respondent on account of such failure to deliver. The case was therefore dismissed.

S-987, April 6, 1935, Docket 1515: (S.P.)

WISHNATZKI & NATHEL, NEW YORK, N.Y. vs. H.D. SOJOURNER & CO., HOPEWELL, MISS.

Violation charged: Failure to deliver.
Principal point involved: Alleged misrouting of car.
Order: Reparation awarded respondent, H.D. Sojourner & Co., against complainant in the sum of $230.83.

Outline of Facts

On June 9, 1934, the parties entered into a written contract as shown by the brokers standard memorandum of sale for the purchase and sale of a car of U.S. No. 1 Mississippi tomatoes at $.80 per lug, f.o.b. shipping point. On the standard form were the following words: "Railroad delivery preferred Penn.", while the blank space for "Positive routing" was not filled in. At the time of sale the car was rolling having been shipped from Crystal Springs, Miss. When the tomatoes reached Buffalo, New York they were routed Lehigh Valley Railroad to New York City, but compalinant advised the broker that respondent had breached the contract which called for delivery over the Pennsylvania R.R. and he would not accept the car, and subsequently the routing was changed to Pennsylvania delivery at New York City.

After complainant's refusal to accept the car because of the alleged misrouting, the respondent resold for a net sum of $289.17, which amount the broker remitted to complainant. The contract price of $520 was paid by the complainant to the broker and the broker was subsequently directed by the complainant to withhold the difference between the contract price and the net resale price, which amounted to $230.83, until the question to whom the money belonged could be decided.

The evidence showed that the standard memorandum of sale provided for either positive routing or preferred routing. In the contract in this case positive routing was not specified but preferred routing was used. The Secretary held that if it were vital to the respondent to have the tomatoes routed for Pennsylvania Railroad delivery it should have been so stated in the written memorandum of sale. Moreover the evidence showed that the tomatoes were actually changed to Pennsylvania delivery, but respondent stated that this caused a delay of some twenty-four hours.

Ruling included in Decision

There was no direction for positive routing in this case and there was no breach of contract in any way on the part of respondent. Therefore, reparation was awarded H.D. Sojourner & Co. against Wishnatzki & Nathel in the sum of $230.83, the difference between the original price of the car and the amount received upon resale.

S-992, April 22, 1935, Docket 1363: (S.P.)

TRI-STATE SALES AGENCY, PITTSBURGH, PA. vs. J.F. BEEDE, MEREDITH, N.H.

Violation charged: Failure to account.
Principal point involved: Broker not entitled to fee as no actual sale made.
Order: Case dismissed.

Outline of Facts

Complainant and respondent conducted negotiations relative to the sale by complainant for and on behalf of respondent of a carload of apples. The complainant contended that the sale was actually negotiated and that respondent owed brokerage fee in the amount of $25. However, the evidence showed that at no time during the negotiations was there a definite unqualified acceptance by one party of an offer by the other.

Ruling included in Decision

There was no agreement between complainant and respondent for the sale by complainant for and on behalf of respondent of a car of Baldwin apples and complainant was not entitled to a brokerage fee from respondent.

S-993, April 22, 1935, Docket 1530: (S.P.)

COLORADO PRODUCE DISTRIBUTORS, DENVER, COLO. vs. A. ROSENZWEIG & SON, KANSAS CITY, MO.

Violation charged: Rejection
Principal point involved: Potatoes not U.S. No. 1 at point of delivery.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent one car of U.S. No. 1 Idaho Triumph potatoes at $1.70 per hundredweight delivered at Kansas City, Mo.; that at the time of sale the car was rolling; that the potatoes were inspected at point of shipment and met the specifications of the contract; that the car was diverted to respondent at Kansas City but was rejected by respondent; that complainant ordered the car re-inspected by a duly authorized inspector of the U.S. Department of Agriculture at Kansas City; that immediately following the rejection by respondent complainant diverted the potatoes to Jonesboro, Ark. at a resale price of $1.75 per hundred

delivered at Jonesboro; that on account of respondent's rejection of the potatoes shipped in compliance with the contract of sale complainant suffered damages represented by the difference between the amount for which the potatoes were sold to respondent and the amount realized by complainant upon resale, being the sum of $72.58.

The inspection certificate issued by the Federal inspection on arrival of the car at Kansas City read in part: "Average five per cent grade defects consisting of growth cracks, second growth, cuts and sunburn." Under "Condition" it was stated, "In about one-half of sacks no decay, but in remainder of sacks from one to three per cent, average one per cent decay." At the time the inspection certificate was issued the inspector stated that the "stock grades U.S. No. 1". However, later the inspector's attention was invited to the fact that he was in error in stating that the potatoes graded U.S. No. 1. He then issued a corrected inspection certificate in which he stated that the potatoes as a whole failed to meet the requirements of U.S. No. 1 on account of decay in some sacks.

Ruling included in Decision

The corrected inspection certificate issued at destination showed that the potatoes did not grade U.S. No. 1 in accordance with the provisions of the contract of sale, and respondent's rejection was not without reasonable cause. The complaint was therefore dismissed.

S-997, April 19, 1935, Docket 1497: (S.P.)

S.P. CALKINS & CO., MEMPHIS, TENN., vs. R.J. HEAD, PLANT CITY, FLA.

Violation charged: Failure to account
Principal points involved: Broker entitled to earned fee; expenses disallowed.
Order: Reparation awarded complainant in the sum of $20, with interest.

Outline of Facts

Respondent employed complainant as his broker to negotiate the sale of a mixed carload of bulk oranges, grapefruit and tangerines and the complainant negotiated the sale, but the purchaser refused to accept the fruit for the reason that it did not comply with the contract of sale. Respondent refused to pay the brokerage. The broker requested damages in the sum of $20 plus expenses of $3.21, or a total of $23.21.

Ruling included in Decision

The complainant was entitled to the usual and customary brokerage fee which was $20; but the expenses which the complainant incurred in connection with the transaction should not be allowed, as brokers usually incur expenses such as telegrams in connection with the negotiation of a sale and the customary brokerage fee covers such expenses. Reparation was awarded complainant in the sum of $20, with interest.

S-1000, April 26, 1935, Docket 1558: (S.P.)

J.W. MYERS COMMISSION CO., VAN BUREN, ARK., vs. C.L. FRANK, EVANSVILLE, IND.

Violation charged: Rejection
Principal point involved: Peaches did not meet terms of contract as to size.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent a carload of Elberta peaches to be 85% and better U.S. No. 1 size, medium to large, mostly medium, good pack, fair color, at $1.00 per bushel Clarksville, Ark. Upon arrival of the peaches at Evansville, Ind. respondent rejected on the ground that they did not conform to the contract of sale, were shriveled, of poor quality and bitter, with no markings on the baskets which the Indiana State law requires.

The peaches were to be "medium to large". The Federal-State inspection certificate dated August 11, 1934 read in part: "Generally ranging 1½ to 2¼, mostly 1-3/4 to 2 inches in diameter, with practically none under 1½ inches diameter". The depositions filed by the respondent indicated that the peaches were not medium to large peaches.

Ruling included in Decision

The peaches did not conform to the contract of sale as to size. Respondent rejected the peaches but his rejection was not without reasonable cause. The case was dismissed.

S-1002, April 26, 1935, Docket 1483: (S.P.)

HELLER BROS. CO., INC., NEW YORK, N.Y. vs. COOPERATIVE FRUIT GROWERS OF ADAMS COUNTY, GETTYSBURG, PA.

Violation charged: Failure to deliver.
Principal point involved: Apples failed to meet contract terms calling for compliance with export requirements.
Order: Reparation awarded complainant in the sum of $220, with interest.

Outline of Facts

Complainant and respondent, through a broker, entered into a contract of purchase and sale calling for two carloads of York Imperial apples, each containing 200 barrels of cold storage, clean, U.S. Utility grade Yorks, 2½ inches and up, free from scald and meeting U.S. standards for export. Respondent was to ship the apples to complainant. Respondent filled the order by repacking into barrels 1200 bushels of apples in storage at Gettysburg, Pa., upon which a previous Federal-State inspection had been made 3 months before, showing that the apples met the terms called for in this contract. However, apparently nothing was said in the negotiations regarding these apples being repacked and there was no evidence to show that the complainant intended to buy or knew that it was to receive repacked apples. On the dates of shipment Federal shipping point inspection was secured on the two cars containing the 1200 bushels of apples, which certificates showed the stock in the two cars to be "U.S. UTILITY 2½" up, and meets U.S. Standards for export." Upon arrival of the apples in Jersey City, complainant being dissatisfied with the stock in the two cars and then knowing that the apples originally constituted one lot in storage on which an inspection had been obtained, requested an appeal inspection on the apples unloaded from one of the cars, MDT 16985. The certificate issued as a result of this inspection showed that the apples failed to grade U.S. Utility because of defects in excess of the tolerance and failed to meet U.S. Standards for export because of scald and slackness of pack. Complainant rejected this car, and upon arrival of the second car also rejected it.

Respondent contended that complainant had no right to remove from car MDT 16985 the contents thereof without having first accepted or rejected the apples; that such removal of the apples by the complainant relieved respondent of any liability for defects in the apples shipped; that respondent denied any liability in regard to the second car MDT 144205 for the reason that the apples were not either inspected, accepted or rejected by complainant and that the inspections which he obtained on the apples showed that they met the contract terms.

Ruling included in Decision

The Secretary held that since the apples were all repacked from the same storage lot, it was apparent from the appeal inspection that the apples in both cars failed to comply with the terms of the contract in that they failed to meet the grade for export requirements and were repacked; that the evidence showed that the complainant had entered into a definite contract for the resale of these apples to a European buyer, f.o.b. New York City at $4.20 per barrel and that complainant was unable to obtain similar apples and thereby suffered a loss due to the failure of the respondent to deliver apples in accordance with the terms of its contract of $220, for which reparation was awarded.

S-1003, April 30, 1935, Docket 1608: (S.P.)

E.L. DUKE, FORT VALLEY, GEORGIA, vs. CLOOBECK & MOSE, INC., CHICAGO, ILL.

Violation charged: Rejection.
Principal point involved: Complainant must prove damages.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent one carload of peaches of Hiley Belle variety at 80¢ per half-bushel basket for 1-7/8" average size, f.o.b. shipping point, Ft. Valley, Ga., and that respondent rejected the car upon arrival, without reasonable cause, damaging complainant in the sum of $391.81, which was the difference between the original contract price of $729.60 and the amount of $337.79 received upon resale.

Respondent contended that he offered to purchase through D.L. Peppard, a car of peaches, one-half of which was to be 1-7/8" and larger at 80¢ per half-bushel basket, and the other half to be 1-3/4" and larger at 70¢ per half-bushel basket; that the car was either to be shipped on July 9th, or rolling on that date in order to arrive by Thursday, July 12, 1934; that the bill of lading was signed 10:30 a.m. July 10; that the peaches did not arrive until Friday, July 13, billed to complainant and respondent could not have obtained the release in time to take possession of the peaches for Friday morning; that there is no peach market on Saturday; that the peaches were to be U.S. #1, hard and free from fuzz or brown rot.

The evidence was conflicting but the record showed that there were corresponding brokers in this matter, D.L. Peppard, Chicago, Ill., and Henry Dingfelder, Fort Valley, Ga. Neither the complainant nor respondent introduced a sworn statement of these brokers, or copies of any telegrams, memoranda of sale, or other papers from which might be ascertained the terms of the contract. In fact, from the record it appeared that a memorandum of sale was never made out by either broker and sent to each party.

Ruling included in Decision

The Secretary held that complainant having alleged that the contract called for the peaches as set forth in his complaint, the burden was upon him to prove said allegation by a preponderance of the evidence. This he wholly failed to do, as the weight of the evidence in the record supported the contention of the respondent. The complaint was dismissed.

S-1004, April 29, 1935, Docket 1507: (Hearing)

HARRY W. MERRILL, FORT LAUDERDALE, FLA., vs. DEMARIA-JANSSEN CO., KANSAS CITY, MO.

Violation charged: Rejection without reasonable cause.
Principal point involved: Peppers bought on specifications of particular varieties and not U.S.grades.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract through a broker whereby complainant was to sell respondent one car of peppers. Following negotiations by wire the broker's memorandum of sale set forth the terms as contained in the telegrams as follows: 456 crates Fancy Florida Peppers $2.15 f.o.b.; 24 crates Choice Florida Peppers $1.15 f.o.b. Approximately half each California Wonder and World Beater varieties good green color, good pack, no shriveled. Complainant alleged that respondent rejected the car without reasonable cause and complainant resold for the net sum of $155.29, which was $852.71 less than the contract price of $1008; that complainant was entitled to damages in the sum of its loss, or $852.71, because of respondent's unjustified rejection.

The complainant further contended that the peppers were inspected at shipping point and the crates stamped "Fancy" graded U.S. No. 1, and the crates which were not stamped graded U.S. No.2, according to Federal-State inspection, and the car was therefore in compliance with the contract. The respondent contended that the contract was for a definite kind or kinds of peppers, without reference to any grades whatsoever; that it was particular to order peppers which were known to have thick walls, and for that reason California Wonder and World Beater peppers were mentioned in several of the wires and in the standard confirmation of sale.

The peppers arrived at Kansas City sometime during Sunday, May 20, 1934. The respondent examined the shipment at 3:30 p.m. the following day, May 21, and ten minutes later the following telegram was sent by the broker to complainant: "JANSSEN DISAPPOINTED PEPPERS SHOW SOME DISCOLORATION AGED CONSIDERABLY SHRIVELED WILTED ONLY THING WILL DO HANDLE CAR CONSIGNMENT YOUR ACCOUNT 20091 FGE ANSWER QUICK WESTERN UNION."

Rulings included in Decision

1. The Secretary held that it was reasonably clear that respondent rejected the shipment within a reasonable time. The testimony given at the hearing was indisputed to the effect that peppers having thick walls were specifically mentioned in the contract of sale, and all witnesses, including the Federal inspector who made the inspection at destination, testified that the peppers shipped were of the long type, which always have thinner walls than the shorter type called for in the contract of sale.

2. Complainant failed to show that the peppers shipped were of the type and kind called for in the contract of sale and the complaint should therefore be dismissed.

S-1005, May 3, 1935, Docket 1656: (S.P.)

MICHIGAN POTATO GROWERS EXCHANGE, CADILLAC, MICH. vs. ZIVI & CO., CHICAGO, ILL.

Violation charged: Rejection without reasonable cause.
Principal points involved: Potatoes did not meet terms of contract; seller accepted check marked "Payment in full".
Order: Dismissed.

Outline of Facts

Complainant sold respondent a car of potatoes and contended that the latter rejected the car without reasonable cause; that the car was finally abandoned to the carrier and nothing was realized for the potatoes, thereby damaging complainant in the sum of $313.20, the price of the car.

The evidence showed that the potatoes were to grade U.S. 1; the Federal inspection certificate at Joliet, Ill. dated June 27, 1934, showed that the potatoes did not grade U.S. 1; at the request of the complainant the potatoes were reconditioned by respondent but nevertheless failed to grade U.S. 1 as shown by the Federal inspection certificate dated July 2, 1934; that the potatoes were purchased for delivery at Chicago but prior to reaching Chicago the complainant was advised by respondent that delivery was desired at Joliet; that complainant agreed to have the potatoes diverted to Joliet and they were so diverted by the railroad, the freight rate being the same and the distance approximately the same; that on August 22, 1934 respondent wrote to the complainant as follows: "We herewith enclose check $236.56 in full up to date for potatoes;" that with this letter was enclosed a check with the following endorsement: "Payment full to date". The complainant contended that this check covered specific items not referred to in the complaint. Neither the letter above quoted nor the check referred to any specific items and complainant submitted no evidence to support its contention on this point.

Ruling included in Decision

The potatoes did not grade U.S. No. 1 as called for in the contract of purchase and sale and on August 22, 1934 complainant accepted a check from respondent in the sum of $236.56 in full settlement for the potatoes, and therefore the complaint should be dismissed.

S-1020, May 21, 1935, Docket 1657: (S.P.)

CALIFORNIA BROKERAGE CO., SAN FRANCISCO, CALIF. vs. TRIANGLE DISTRIBUTING CO., NORTH FALMOUTH, MASS.

Violation charged: Failure to account.
Principal point involved: Broker assumed duty of securing space on steamer for shipment and having failed to secure space in accordance with contract respondent was released from liability as to brokerage.
Order: Case dismissed.

Outline of Facts

Complainant alleged that respondent employed it as broker to negotiate the sale of 8,000 boxes of cranberries to be shipped from Boston to San Francisco; that complainant negotiated the sale strictly in accordance with instructions and respondent confirmed the sales but refused to ship the cranberries; that respondent failed to pay complainant the reasonable value of the services rendered in the sum of $400.

The evidence disclosed that the complainant wrote to respondent on September 6, 1934 stating that he had offers from dealers to purchase 8000 boxes of cranberries, f.o.b. Boston docks subject approval of price; 3000 boxes to be loaded on the President Polk sailing October 6; 2000 on the President Adams sailing October 28; and 3000 on the President Harrison sailing November 11. On September 10 the respondent telegraphed the complainant in part as follows: "CONFIRMING LETTER SIXTH BOOKING HOWES POLK OCTOBER SIXTH ADAMS TWENTY EIGHTH HARRISON NOVEMBER ELEVENTH STOP PRICE FOB CAPE POINTS AMERICAN CRANBERRY EXCHANGE OPENING HOWES * * *" On September 17 the complainant wrote to respondent: "Received your wire confirming the cars ordered under the terms ordered". In this letter, however, it was stated that complainant desired to increase the bookings, that there was an error in the date of the sailing of the POLK and it should be changed to October 15; and the quantities of the cranberries were raised from 8000 to 11000 boxes. It was also stated that there might be an additional increase of 2000 boxes, making 13,000 in all. Respondent telegraphed on September 21 that he was unwilling to consent to the proposed changes. Numerous wires then passed between the parties with a view to modifying the contract already entered into. These wires failed to result in an agreement between the parties.

Respondent alleged it was willing at all times to ship the 8000 boxes of cranberries as confirmed but that the "drastic changes in shipping instructions, both as to port and date, gave it the right to cancel the bookings."

Rulings included in Decision

1. The complainant had consummated a sale calling for 8,000 boxes of cranberries at the price quoted by the American Cranberry Exchange on Howes f.o.b. Cape Points with shipments on designated boats at designated times. Generally the fact that the broker had consummated the sale would have been sufficient to entitle the complainant to his brokerage. However, in this case the complainant, as the broker, assumed the duty of booking steamer space for the cranberries and having undertaken to book this space and predicated the agreement thereon, it was complainant's duty to secure the designated space on the boats. He failed to arrange the space on the designated boats and attempted to vary the contract. The respondent did not agree to the attempted modification. Having assumed this duty the complainant's failure to secure space released the respondent from liability as to brokerage claims.

2. Failure of complainant to secure the designated steamer space, having assumed the duty to do so, released respondent from liability for brokerage since respondent was ready and willing to furnish the commodity in accordance with the terms of the contract and therefore the complaint should be dismissed.

S-1021, May 22, 1935, Docket 1598: (S.P.)

ECONOMY FRUIT CO., DUBUQUE, IOWA, vs. VICTOR REMLEY, ORRICK, MO.

Violation charged: Failure to account.
Principal point involved: Car did not meet contract terms but complainant failed to prove that respondent granted an allowance.
Order: Case dismissed.

Outline of Facts

Respondent sold to complainant one carload of potatoes at $1.54 per cwt. delivered. Complainant contended that the potatoes did not meet the terms of the contract and that it accepted the potatoes after a mutual agreement that due to the decay the complainant would receive an allowance of 20¢ per cwt. or a total of $60; that complainant accepted the potatoes and paid respondent's draft in the sum of $462, but respondent refused to pay complainant the mutually agreed allowance of $60.

Respondent denied that any reduction was authorized and stated that the only time reduction was considered was when it was alleged that the potatoes were delayed due to a washout, and subsequently respondent determined from an investigation that there had been no washout and that the potatoes had not been delayed in transit and under the circumstances declined to make any allowance whatever. Complainant testified that the potatoes were heated and badly decayed and that respondent agreed to an allowance of 30¢ per cwt. The broker testified that respondent "authorized the sale at 25¢ a cwt. reduction and if necessary 30¢ per cwt."

The evidence showed that respondent telegraphed the broker as follows: "TRY TO FIND CAR THAT THINK SATISFACTORY STOP NOTHING IS FANCY MOST CARS GRADING EIGHTY PERCENT USONE WILL SHIP BEST CAR POSSIBLE WE DONT WANT ANY DISSATISFACTION OR TROUBLE WITH CARS." The same day the broker telegraphed respondent in part as follows: "ECONOMY FRUIT CO CAR COBBLERS AS DESCRIBED BY PHONE DOLLAR FIFTY FOUR DELIVERED * * *". Respondent replied: "AMERICAN TWELVE SIX SEVEN TWO THREE HUNDRED SACKS EIGHTY FIVE PERCENT USONE OUT TONIGHT TO ECONOMY."

The Federal-State shipping point inspection certificate read in part: "Approximately 85% of stock of U.S. No. 1 Quality". It will be seen, therefore, that the respondent first thought that he could secure a car of potatoes that would grade 80% U.S. No. 1 and so advised the broker. The potatoes did grade approximately 85% U.S. No. 1 at shipping point. However, the record indicated that at the time of delivery the potatoes were not in such condition as to be considered as complying with the contract. On the other hand, the Secretary held that complainant failed to present any satisfactory evidence that respondent actually agreed to grant the allowance claimed.

Ruling included in Decision

The potatoes did not conform to the specifications of the contract of sale but complainant failed to show that respondent agreed to grant the allowance claimed and therefore the complaint was dismissed.

S-1024, May 23, 1935, Dockets 1531 and 1531-A: (S.P.)

ALLEGRI PRODUCE CO., INC. LOXLEY, ALA. vs. QUALITY PRODUCE CO., CLEVELAND, OHIO. and counter-complaint.

Violation charged: Failure to account.
Principal point involved: Broker failed to make valid contract and exceeded authority of principal causing loss to both parties.
Order: Complainant awarded $159.22.

Outline of Facts

Complainant alleged that it sold to respondent one carload of cucumbers containing 90 bushels of U.S. No. 2 cucumbers at 60¢ per bushel basket and 193 bushels of U.S. No. 1 cucumbers at 70¢ per bushel basket; that in order to make the minimum weight there were shipped 75 bags of U.S. No. 1 Irish potatoes and 27 bushel baskets of beans; that the cucumbers were inspected at shipping point; that this was an f.o.b. shipping point sale negotiated by K.B. Pocock as broker; that upon arrival of the car respondent asked for an allowance of 25¢ per bushel to which complainant replied: "DONT BREAK CAR IF UNACCEPTED AT INVOICE WILL DIVERT ANSWER QUICK"; that respondent owed complainant the sum of $246.81 for the sale price of the cucumbers and the net proceeds on the potatoes and beans; that the respondent sold the contents of the car mailing the complainant a check for $159.22 claiming that the shipment was treated as a consignment; and that this check was returned to respondent.

Respondent contended that it ordered fancy cucumbers but when the car arrived it contained 193 bushel baskets of No. 1 cucumbers, 90 baskets of No. 2 cucumbers, 75 bags of potatoes and 27 baskets of beans, and it did not therefore comply with the specifications in the broker's memorandum of sale; that respondent having sold a number of the cucumbers had no alternative other than to break the car in order to fill as many of the orders as possible even though it was necessary to repack most of the packages; that not being able to agree upon a price the car was treated as a consignment and an accounting rendered accordingly; that the net amount less expenses was $159.22 for which amount a check was mailed to complainant but returned by the latter; that according to U.S. Government quotations on cucumbers on June 6, 1934, the date the car was due and arrived, respondent suffered a loss of $221 from which should be deducted $159.22 representing the net amount for which the cucumbers were sold leaving $61.78 due from complainant to respondent.

Rulings included in Decision

1. The Secretary held that although negotiations were entered into between complainant and respondent for the purchase of the cucumbers through the broker, it was clear that there was no valid and binding contract entered into at any time; that the broker did issue a memorandum of sale which read: "1 car Cukes. Price later. Heavy fancies possible"; that the very wording of this memorandum showed that a definite agreement had not been entered into and the broker had no authority to issue such a memorandum or to advise either complainant or respondent that a sale had been made.

2. The Secretary further held that the broker again exceeded his authority when he delivered the car to the respondent although the complainant had wired the broker not to break the car unless it was accepted at invoice price. However, since respondent accepted the car the Secretary held that there was an implied contract that it would pay the reasonable value thereof. The respondent tendered the sum of $159.22 in payment for the car as net proceeds and under the implied contract the complainant is entitled to this sum as reparation.

3. The Secretary also stated that this case illustrates the importance of brokers preparing definite contracts of purchase and sale correctly describing the quality, quantity, grade and price of the produce; that the broker by his failure to do this and his actions without authority of his principal caused loss to both parties in this case. Reparation was awarded the complainant in the sum of $159.22.

S-1025, May 23, 1935, Docket 1698: (S.P.)

GEORGE F. AND JAMES W. HART, INC., SANDY HOOK, MISS. vs. BURKE RIDDICK, MEMPHIS, TENN.

Violation charged: Failure to account.
Principal point involved: Interest because of delay in paying for car not allowed because seller accepted check in full payment therefor; buyer must account in full for cars bought.
Order: Reparation awarded complainant in the sum of $297.50, with interest.

Outline of Facts

Complainant, by unwritten contract, sold to respondent 2 carloads of U.S. No. 1 Irish potatoes consisting of 500 sacks, 100 pounds to the sack, at the price of $1.25 per cwt., less commission of $15 per car, f.o.b. Sandy Hook, Miss. The complainant shipped the two cars from Sandy Hook, Miss. to itself at Paducah, Kentucky, and thereafter diverted them from Paducah to respondent at Memphis, Tenn. The cars were received and accepted by respondent on or about June 1, 1934. On December 6, 1934, respondent paid complainant the sum of $297.50 in part settlement of the total amount of $595 due from respondent to complainant, leaving a balance due complainant of $297.50. In addition to the amount due on the second car, with interest, the complainant requested interest from June 1, 1934 to date of payment on the check in the sum of $297.50 received from respondent on the first car.

Rulings included in Decision

1. The Secretary held that this interest requested on the first payment could not be allowed as complainant accepted the amount tendered, and it will be considered that he accepted such payment as settlement in full for the car.

2. Respondent failed truly and correctly to account to complainant within the meaning of the Act for the purchase price of the second car and complainant should be awarded damages against respondent in the sum of $297.50, with interest until paid.

S-1028, June 3, 1935, Docket 1617: (S.P.)

WESTERN FRUIT & PRODUCE CO., YAKIMA, WASH., vs. COOPERMAN FRUIT CO., MINNEAPOLIS, MINN.

Violation charged: Rejection.
Principal points involved: Rejection not made within reasonable time, allegedly due to inability to inspect because of freezing weather.
Order: Reparation awarded complainant in the sum of $182.81, with interest.

Outline of Facts

Complainant and respondent, through a broker, entered into a contract for the purchase and sale of a carload of apples, delivered at Minneapolis, Minn. the net contract price being $482.69. The car arrived at Minneapolis on February 23, 1934 and was rejected by respondent on March 1. Complainant resold the car for the net price of $299.88 and requested damages in the sum of $182.81, which was the difference between the original contract price and the amount received upon resale.

Respondent contended that the apples were warranted by complainant to be of the best quality, grade A, firm, sound and absolutely free from rot and decay and to be delivered in Minneapolis in first class condition but the apples did not conform to the specifications of the contract of sale, due to 5% decay and 10 percent shrivelling, as disclosed by a state inspection made on February 27; that when the apples arrived on February 23, the weather was approximately 9° below zero and continued to remain below zero on February 24, 25, 26 and 27; that respondent was prevented from inspecting the apples due to the freezing weather; that notwithstanding the weather was below freezing, the respondent made a preliminary inspection of the apples on February 25, 1934 at 1:00 p.m. at which time the respondent "determined that said merchandise was not of the same quality as was purchased by him"; that respondent obtained an official inspection on February 27; and that after some negotiations with the complainant, the apples were rejected on March 1, 1934.

Rulings included in Decision

1. The weight of the evidence showed that the apples arrived at Minneapolis on the morning of February 23, were partially inspected by respondent on February 25, were inspected by a state inspector on February 27, and were not rejected until March 1. It is true that respondent contended that the weather was extremely cold, and the evidence showed this to be a fact, however, it was seven days after the arrival of the apples before they were rejected by the respondent. Even though during part of this time the weather was below zero, it was not below zero nor extremely cold for seven days. The rejection, therefore, was not within a reasonable time after the apples arrived.

2. Furthermore, the respondent did not secure federal or federal-state inspection as contemplated by the regulation. In view of the conclusion here reached, it is not necessary in this case to determine what weight shall be given to the inspection certificate submitted by the respondent.

3. Reparation was awarded complainant in the sum of $182.81, with interest.

S-1029, June 5, 1935, Docket 1577: (S.P.)

WESTERN FRUIT GROWERS, INC., LOS ANGELES, CALIF., vs. HENRY SPEILLER and/or SPEILLER BROS., UTICA, N.Y.

Violation charged: Rejection.
Principal point involved: No valid contract.
Order: Case dismissed.

Outline of Facts

The complainant alleged that it sold to respondent one carload of U.S. No. 1 grade 2½" minimum, Palisade, Colorado Elberta peaches in bushel baskets at $1.40 per basket f.o.b. shipping point or a total price of $634.20; that Federal-State inspection at shipping point showed the peaches met the terms of the contract but respondent rejected them upon arrival at destination and complainant was compelled to resell; that complainant was entitled to damages in the difference between the original contract price of $634.20, and the amount received upon resale, $368.76, or a total of $265.44.

The respondent contended that the peaches were to be delivered to him at Utica, N.Y. subject to inspection by him and in the event they were not "free of fuzz, ring face, free from decay and of a good color" respondent had the right to reject the peaches; and that they arrived at Utica on August 26 at 7 A.M. and on the same date were examined by respondent and his agents and were found to be of a different quality than those purchased and that they were jumbo packed, fuzzy and of a dirty color and showed some decay.

The evidence showed that the negotiations were started on August 22, 1934 by telegrams which were exchanged between the complainant and the broker. The first telegram in the record was from the broker to the complainant as follows: "ABSOLUTELY BEST SPEILLER $1.40 COLORADO US NO. 1 ELBERTAS 2¼" AND UP RINGFACED PACK NEAREST ROLLER INSPECTION AND ACCEPTANCE ON ARRIVAL." The complainant answered in a wire to the broker on August 22 as follows: "CONFIRM DIVERTING DRAFTING ISSEY SPEILLER UTICA DIVERTED FROM KANSAS CITY TODAY CAR SHIPPED SIXTEENTH 453 BUSHELS PALISADE COLORADO ELBERTA PEACHES US NO. 1 2¼" AND UP $1.40 FOB ROUTED NYC RR ART 12761". Later the same day the broker again wired the complainant stating: "SPEILLER SPECIFIES GOOD COLOR PEACHES CONFIRM IF POSSIBLE FURNISH DIFFERENT BRANDS THAN GENNIS ART 12761." Thereafter the broker issued a standard memorandum of sale showing the terms to be f.o.b. inspection and acceptance on arrival.

Ruling included in Decision

1. The broker was clearly without authority to issue such a memorandum. As shown by the telegrams set out above the respondent, through the broker, was quoting inspection and acceptance on arrival while the complainant was quoting straight f.o.b. These terms were inconsistent and there was not such a meeting of the minds as to constitute a valid and binding contract. The complaint was therefore dismissed.

S-1033, June 7, 1935, Dockets 1519 and 1519-A

LEWIS D. GOLDSTEIN, PHILADELPHIA, PA., vs. THOMAS M. RINI, INC., CLEVELAND, OHIO, and COUNTERCOMPLAINT

Violations charged: Failure to account and failure to deliver.
Principal points involved: Melons failed to meet seller's warranty; buyer accepted and claimed damages in amount of profit it would have made had the car been as warranted; buyer's claim denied as he only entitled to difference between original price and gross sales received by him; delivered price sale.
Order: Complainant's complaint dismissed; respondent Thomas M. Rini, Inc. awarded reparation in the sum of $34.18, with interest.

Outline of Facts

Complainant alleged that it sold respondent a car of cantaloupes, which were accepted by the latter who failed to pay the purchase price in the sum of $693.80.

Respondent contended that the car did not meet complainant's warranty and asked for an award of damages in the sum of $169.78.

The evidence showed that on the 16th day of August, 1933, complainant received from respondent an oral order for a carload of Honeyball cantaloupes; that the car was then on track at Chicago, Ill., having been loaded at a California shipping point and contained 99 crates of Jumbo cantaloupes size 45s, 165 crates Jumbo size 36s and 28 Standard crates size 45s; that the agreed purchase of the Jumbos was $2.40 per crate and the Standards $2.15 per crate delivered at Cleveland. The sale was made through the Gillarde-Bruns Co. of Chicago, Ill., as brokers, and it was orally warranted by them that the cantaloupes would be of good quality and condition upon arrival at Cleveland. Following the oral purchase of the car complainant forwarded it to respondent at Cleveland where it arrived on August 18. On August 19, after respondent had unloaded part of the contents of the car a Federal inspector examined the remaining portion which showed that the stock did not meet the seller's warranty of "good quality and condition". Other inspectors who inspected the cantaloupes found that they were affected by decay to a greater average extent than was found by the Federal

Although the respondent accepted the car after the inspection was made, it did not pay the full purchase price of $693.80, but did pay the freight amounting to $499.93, leaving a balance on the purchase price of $193.87.

Rulings included in Decision

1. This was a delivered price sale. The evidence indicated that the stock on arrival at Cleveland did not meet the seller's warranty as "good quality and condition." The complainant's complaint was therefore dismissed.

2. The respondent's contention that it was entitled to the market value at Cleveland as shown by sales made of like grades on the Cleveland market was without merit. This would be in the nature of an award for profits, and respondent failed to prove that he was entitled to such profits. However, the value of the cantaloupes had they met the terms of the warranty was $693.80 and the value as actually delivered was $465.75. On account of the breach of warranty respondent suffered loss and was damaged in the difference between the original price and the actual value upon delivery or the sum of $228.05. However, respondent paid only $499.93 on the original contract price, leaving a balance due of $193.87. This sum deducted from $228.05 left $34.18, the amount of reparation due respondent.

S-1034, June 8, 1935, Docket 1721: (S.P.)

LITCHARD, SCHULTHEIS & JOHNSON, INC., WELLSVILLE, N.Y. vs. BOROVETZ-KANSELBAUM & COMPANY, PITTSBURGH, PA.

Violation charged: Rejection.
Principal point involved: Placing of 12 sacks of No. 2 onions in car calling for U.S. No. 1 not good delivery.
Order: Case dismissed.

Outline of Facts

The parties in this case entered into a contract for the purchase and sale of "One (1) Car US#1 Yellow Globe Onions, 70% or Better 2", in 50-lb Peach-Colored Saxolin Bags @ $1.07½ per Bag Delivered". The complainant placed 12 sacks of No. 2 onions in the car to bring the load up to the minimum weight of 24,000 pounds, and invoiced the 12 bags at 55¢ per bag delivered. Upon arrival respondent refused to accept because of the 12 bags of No. 2 onions and complainant secured permission from the railroad to replace the 12 bags with No. 1 onions, instructing the broker accordingly. However, respondent continued to reject the car and complainant sold for his account, claiming damages in the difference between the original contract price and the amount received upon resale, plus the cost of wires and telephone conversations, or a total of $57.28.

Respondent had sold this car to an out of town buyer with the storage transit privilege for future diversion and his contract with the buyer (Robert G.Wilbourn) was that the onions were to grade U.S. No. 1 at $1.10 per sack delivered, or 2½¢ per sack above the original purchase price. The buyer (Mr. Wilbourn) desired to have the privilege of the storage in transit rate and upon inspection of the onions ascertained that the car contained some onions which were not U.S. No. 1 of the size specified and that these onions could not be removed without losing the privilege of the storage in transit rates. He therefore refused to accept the onions from the respondent. However, as stated above the carrier, upon request of the complainant, subsequently agreed to the substitution of U.S. No. 1 onions for the twelve sacks which did not conform to the contract.

Ruling included in Decision

1. Since the onions did not conform to specifications of the contract of sale, respondent's rejection was not without reasonable cause. The case was therefore dismissed.

S-1035, June 7, 1935, Docket 1723: (S.P.)

TRI-STATE SALES AGENCY, PITTSBURGH, PA., vs. L.J. PRICEMAN, ROCHESTER,N.Y.

Violation charged: Failure to account.
Principal point involved: Broker fulfilled his duty when he consummated sale between the parties and was entitled to a reasonable brokerage fee.
Order: Reparation awarded complainant in the sum of $30.

Outline of Facts

Respondent employed complainant as his broker to sell for and on behalf of respondent two carloads of onions. The complainant negotiated the sale for and on behalf of respondent but the latter refused to pay the brokerage charge of $15 per car, stating "*** As neither of these cars were accepted, I do not figure that I owe them any brokerage." One of the cars was not accepted by the buyer because the respondent failed to conform to the contract terms and respondent never made delivery of the other car to the purchaser.

Ruling included in Decision

The complainant fulfilled his duty when he consummated the contract for the sale of the two cars of onions and it was immaterial whether the cars were accepted by the parties. There was no evidence of an agreement between the parties as to the amount of the commission to be paid for the sale of the onions, but respondent did not question the reasonableness of the amount claimed by complainant. Therefore complainant was awarded reparation in the sum of $30.

S-1037, June 14, 1935, Docket 1546: (Hearing)

WESTERN FRUIT GROWERS, INC., LOS ANGELES, CALIF., vs. BARTLETT PRODUCE CO., WICHITA, KANSAS.

Violation charged: Rejection.
Principal points involved: F.o.b. sale and inspection acceptance arrival sale have different meanings; no meeting of minds and therefore no valid contract.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent a car of Red Malagas and Thompson Seedless grapes f.o.b. shipping point in California at a total price of $1182.60; that respondent rejected the car and resale produced a net return of $657.70 less than the original sale price.

Respondent answered that "while respondent was agreeable to paying the quoted price on an f.o.b. basis, yet the sale actually was to be made on a delivered basis * * *"; that the grapes were not of the kind, grade and quality "called for in said contract of sale," and respondent "denies that it is in any way responsible for any loss sustained by complainant."

Mr. H.K. Bartlett of respondent company testified that he asked the broker "to wire the Western Fruit Growers for a quotation on a car of grapes". Complainant answered and quoted f.o.b. prices for rolling cars. Mr. Bartlett then "instructed" the broker to submit a counteroffer "of $1.10 on Red Malagas and 85 cents on the Thompsons, inspection and acceptance on arrival". Complainant answered, declining to sell at the counteroffer prices stated. Respondent, through the broker, then wired complainant as follows: "ANSWERING STAISFACTORY YOUR PRICES SUBJECT INSPECTION ACCEPTANCE ARRIVAL RD-21807 CONFIRM." The complainant replied to this by a wire reading as follows: "CONFIRM DIVERTING DRAFTING BARTLETT RED MALAGAS $1.25 SEEDLESS 85¢ FOB USONE TABLE ROUTED SANTA FE RD 21807."

Ruling included in Decision

1. The intent of the parties may be determined from the language of the negotiations. It was clear that respondent intended by its offerings something other than the usual f.o.b. terms. The definition of f.o.b. does not permit inspection and acceptance on arrival, but merely an inspection to determine if the produce met the terms of the contract at shipping point. Thus respondent was quoting terms inconsistent with the standard definition of f.o.b. The complainant was offering to sell the car on an f.o.b. basis and there was no indication of any intention to vary or modify this term. Therefore there was no meeting of minds and because of the failure of the parties to enter into a contract it was unnecessary to discuss the other questions presented by the record.

S-1043, July 1, 1935, Docket 1610: (Hearing)

LOUIS TAUB & COMPANY, INC., FORT MEADE, FLORIDA, vs. JOSEPH ROTHENBERG, BUFFALO, N.Y.

Violation charged: Failure to account.
Principal point involved: Consignor must remit to commission merchant deficit incurred in selling the former's produce.
Order: Reparation awarded respondent, Joseph Rothenberg, in the sum of $87.41, with interest.

Outline of Facts

Complainant alleged that it shipped to respondent a mixed car of oranges and grapefruit to be sold by respondent for complainant's account; that respondent guaranteed a sale price of $1.25 per box; that respondent failed to pay complainant the net returns in the sum of $117.54.

Respondent contended that two carloads of grapefruit and oranges were handled for the account of complainant by respondent; that respondent's guaranteed minimum sale price was upon the condition that the oranges were to be designated sizes; that the second car was not of the sizes specified and on account thereof respondent sustained a loss in the sum of $204.95.

The agreement between the parties made through an exchange of telegrams called for eighty percent of the oranges to be of size 176 and smaller. In accordance with this agreement complainant shipped a car from Fort Meade, Fla. to respondent at Buffalo, N.Y. which included 344 boxes of oranges of which 280 were size 176 and smaller. Respondent accepted the shipment and sold it for a net return of $117.54. The second car containing oranges and grapefruit included 388 boxes of oranges of which 196 boxes were of size 176 and smaller. Respondent accepted this shipment and paid to complainant the guaranteed advance selling the oranges and grapefruit at Buffalo, N.Y. for the gross amount of $1,115.30. Out of the gross receipts respondent paid freight and other charges against the shipment, together with a selling charge, in the total amount of $1,320.25, which was $204.95 more than he received for the second car of fruit. Respondent then stopped payment on the check representing net returns on the first car received and sold.

Ruling included in Decision

There was a substantial difference in the sizes of the two shipments. Complainant is entitled to recover on its complaint and respondent is entitled to recover on his counterclaim. The amount of complainant's unpaid claim should be deducted from the amount of respondent's deficit and reparation award entered in respondent's favor for the difference, in the amount of $87.41.